TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1913

No. [illegible] 268

W. W. SMITH, PLAINTIFF IN ERROR,

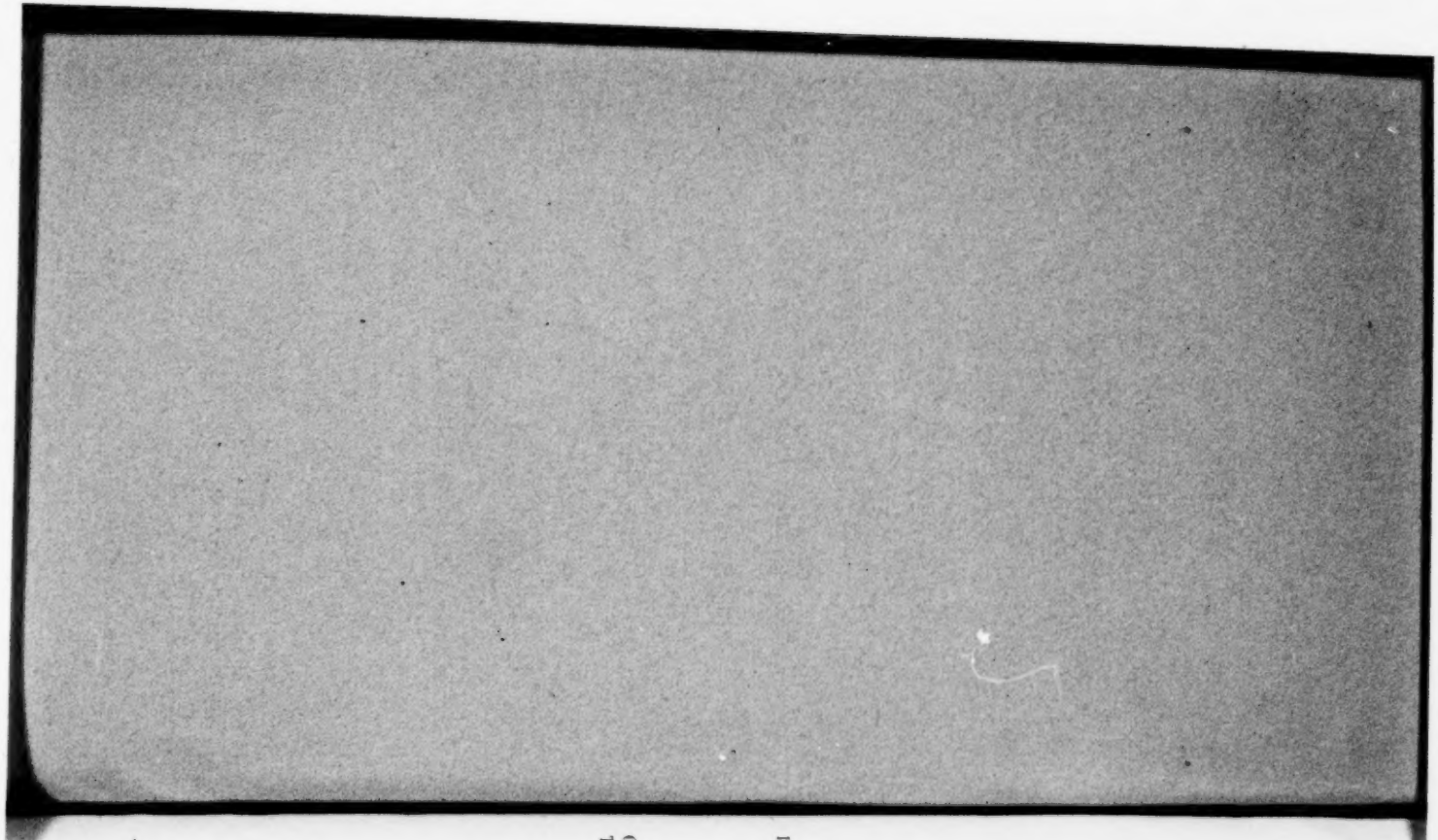
vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

FILED MAY 31, 1912.

(23,235)



(23,235)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 667.

W. W. SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 18, 1913.

1 *Caption.*

THE STATE OF TEXAS:

At a term of the Honorable Court of Criminal Appeals of the State of Texas, begun and holden within and for the State of Texas, at Austin, and convening on the second day of October, A. D. 1911, and which is still in session—present, Honorable W. L. Davidson, Presiding Judge and Judges A. J. Harper and A. C. Prendergast—the following proceedings on appeal were had in the cause of W. W. Smith, appellant, vs. The State of Texas, appellee, No. 867—Appeal from Gregg County—to-wit:

2 TRANSCRIPT FROM LOWER COURT.

Caption.

THE STATE OF TEXAS,
County of Gregg:

At a term of the County Court begun and holden within and for the County of Gregg at Longview, Texas, on the 11th day of July, A. D. 1910, and which adjourned on the 30th day of July, A. D. 1910, the Honorable J. H. McHaney, Judge thereof presiding, the following cause came on for trial towit:

No. 1990.

THE STATE OF TEXAS
vs.
W. W. SMITH.

Complaint.

In the name and by the Authority of the State of Texas:

Before me, the undersigned authority, on this day personally appeared J. J. Butts, who after being by me duly sworn, on oath deposes and says: that heretofore, towit: on or about the 22nd day of July, A. D. 1910, and before the making and filing of this complaint, in the county of Gregg, and state of Texas, one W. W. Smith, did then and there unlawfully act as a conductor on a railroad train in this State, the same being a freight train on the railroad of The Texas and Gulf Railway Company, the said The Texas and Gulf Railway Company being a corporation duly incorporated under and by virtue of the laws of the State of Texas, without the said W. W. Smith having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and the said W. W. Smith not then and there acting as a conductor on said railroad train in case of the disability

of a conductor while out on the road between division terminals, and the said W. W. Smith not then and there acting as a conductor on said railroad train in case of emergency where the said The Texas and Gulf Railway Company could not obtain a person to act
3 as conductor who had for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and the said W. W. Smith not then and there acting as a conductor on a railroad train in this State on a line of railway less than twenty five miles in length, and the line of railway of the said The Texas and Gulf Railway Company at that time not being less than twenty five miles in length, against the peace and dignity of the State.

J. J. BUTTS,
Complainant.

Sworn to and subscribed before me, this 23rd day of July, A. D. 1910.

W. C. SHOULTZ,
County Attorney Gregg County, Texas.

Endorsed: No. 1990. Complaint. In County Court of Gregg County. State of Texas vs. W. W. Smith. Filed July 23, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Information.

In the name and by the Authority of the State of Texas:

Now comes W. C. Shoultz, County Attorney of Gregg County, Texas, upon affidavit of J. J. Butts hereto attached and made a part hereof, and in behalf of said State presents in the County Court of Gregg County, Texas, at the July Term, 1910, of said Court, that heretofore, towit: on or about the 22nd day of July, 1910, in said county of Gregg and State of Texas, one W. W. Smith, late of said County and State, with force and arms, did then and there unlawfully act as a conductor on a railroad train in this State, the same being a freight train on the railroad of The Texas and Gulf Railway Company, the said The Texas and Gulf Railway Company being a corporation duly incorporated under and by virtue of the laws of the State of Texas, without the said W. W. Smith having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and the said W. W. Smith not then and there acting as a con-
4 ductor on said railroad train in case of the disability of a conductor while out on the road between division terminals, and the said W. W. Smith not then and there acting as a conductor on said railroad train in case of emergency where the said The Texas and Gulf Railway Company could not obtain a person to act as conductor who had for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and the said W. W. Smith not then and there

acting as a conductor on a railroad train in this state on a line of railway less than twenty five miles in length, and the line of railway of the said The Texas and Gulf Railway Company at that time not being less than twenty five miles in length: contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State.

W. C. SHOULTS,
County Attorney of Gregg County, Texas.

Endorsed: No. 1990. Information. In County Court of Gregg County. State of Texas vs. W. W. Smith. Filed July 23, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

In County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

THE STATE OF TEXAS
vs.
W. W. SMITH.

Defendant's Motion to Quash Information.

Now comes the defendant in the above styled and numbered cause and moves the Court to quash the information in said cause for the following reasons, towit:

(1.) Chapter 46 of the Laws of the Thirty First Legislature of the State of Texas, the same being enacted in the year 1909 by the Legislature of the State of Texas, is unconstitutional.

(2.) The said law under which this information is drawn is in violation of the bill of rights as incorporated in the Constitution of the State of Texas, in that it is an interference with the personal liberties of the Texas and Gulf Railway Company and the defendant in this case, and with other railway companies and individuals, and prevents them from exercising their constitutional rights of making contracts.

(3.) The said act of the Legislature under which this information is drawn is in violation of the provisions of the Bill of Rights, and is in violation of both Federal and State Constitutions, in that it prevents the free right of contract on the part of railway companies and individuals, and it prevents a man from earning a liv-lihood, and from voluntarily engaging in an avocation of life to which he is well adapated, and is an unreasonable, unwarranted and unnecessary interference with the rights of persons to make contracts for employment, and tends to deprive citizens of the right to make an honest living in callings that they have voluntarily selected and are capable of pursuing.

(4.) The said law under which this information is drawn indicates a spirit of pernicious activity and despotic paternalism, which is repugnant to our free institutions.

(5.) The said law under which this information is drawn is class legislation, in that it attempts to prescribe the qualifications of employés of railway companies, railway operators and receivers, but of no other persons or institutions.

(6.) The said law under which this information is drawn is in violation of the Constitution of the State of Texas and of the Constitution of the United States, because the same is an unnecessary interference with the duties of the Railroad Companies in this State, their operators and receivers, in that it is the duty of each and every railroad company, railroad operators or receiver to exercise the highest degree of care for the safe transportation of their passengers, and to exercise ordinary care for the safety of their employés, and is an insurer of the safe transportation of goods entrusted to them, and the said act of the Legislature interfer-s with the Railroad Companies, railroad operators and receivers, in their right to make free choice of the agents and employés to represent them in carrying out their obligations to their patrons, their employés and the public.

(7.) The said act of the Legislature is in violation of the Constitution of the United States and the Constitution of the State of Texas in that it prevents Railway Companies that are
6 common carriers from employing men well qualified to act as conductors and engineers that have not served the time prescribed in the said Act as conductors and engineers, and thereby restricts the Railway Companies in their right to employ capable and qualified men in such positions for the purpose of assisting the said Railway Companies in performing their duties to the public, the State, the United States Government, their patrons and employees.

(8.) The said Act of the Legislature is an interference with interstate commerce.

(9.) The passage of the act of the Legislature under which this prosecution is being pushed, is an undue interference on the part of the Legislature with the right of contract.

(10.) The act of the Legislature under which this prosecution is being pushed is an unreasonable and unnecessary exercise of what is known as the police power of the State.

(11.) The said act of the Legislature is in violation of the Constitution of the State of Texas in that it provides special privileges to persons who have served or worked in the capacity of a brakeman or conductor on a freight train for two years prior to the time of asking for employment as a conductor, and because it is a law impairing the obligation of contracts and preventing the free right of contract for labor between parties, and because it deprives citizens of this State of the privilege of making contracts for service and entering into and performing services for which they are adapted.

(12.) The said Act of the Legislature is in violation of the Constitution of the United States in that it is an interference with interstate commerce, which, under the Constitution of the United States, the Congress of the United States has entire authority to regulate and control, and because the same impairs the obligation of con-

tracts, and prevents the free right of making contracts between persons of said Nation.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

7 Endorsed: No. 1990. State of Texas vs. W. W. Smith Defendant's Motion to Quash Information. Filed July 25" 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

THE STATE OF TEXAS
vs.
W. W. SMITH.

Judgment Overruling Defendant's Motion to Quash Information.

On this the 25th day of July, A. D. 1910, this cause was called, and thereupon came on to be heard the defendant's motion to quash the information in said cause, and the same having been heard and considered, it is the opinion of the Court that it should be overruled, and it is therefore considered, ordered and adjudged by the Court that the defendant's motion to quash the information in this said cause be and is hereby in all things overruled, to which ruling and judgment of the Court the defendant in open Court excepts.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
—
W. W. SMITH.

Verdict and Judgment.

On this the 25th day of July, A. D. 1910, this cause was called for trial, and the State of Texas appeared by its County Attorney, and the defendant appeared in person and by his attorneys and both the State and the defendant announced ready for trial, and thereupon a jury of six good and lawful men was duly selected, empannelled and sworn, to well and truly try the cause, and a true verdict render therein according to the law and the evidence, composed of W. D. Utzman and five others, and thereupon the County Attorney, in behalf of the State of Texas, read the bill of information to the jury, and the defendant pleaded not guilty thereto, and

after hearing the evidence and the argument of counsel, and receiving the charge of the Court, the jury retired in charge of the proper officer to consider of their verdict, and on the same day returned into open court the following verdict.

8 "We, the jury, find the defendant guilty as charged and assess his punishment at a fine of $25.00.

W. D. UTZMAN, *Foreman.*"

It is therefore considered, ordered and adjudged by the Court that the State of Texas do have and recover of the defendant W. W. Smith, the sum of twenty five dollars and all the costs of this prosecution, and the said defendant being present in Court is hereby committed to jail until such fine and costs are paid, and it is ordered that execution issue against the property of the said defendant for the amount of such fine and costs.

In the County Court of Gregg County, Texas.

No. 1990.

STATE OF TEXAS
vs.
W. W. SMITH.

Statement of Facts.

Be it remembered that upon the trial of the above cause the following were the facts and all the facts adduced in evidence in said cause, towit:

GEO. W. LOVICK, being duly sworn, testified in behalf of the State, as follows: "My name is Geo. W. Lovick. I reside in Longview, Gregg County, Texas, and have resided in said Longview for over two years. I know W. W. Smith, the defendant in this cause, and have known him for some time. On July 22, 1910, W. W. Smith, the defendant in this cause, acted as a conductor on a railroad train in this State, in Gregg County, in the State of Texas, and ran a freight train as a conductor in said County and in said State on said date. He acted as a conductor on said freight train, in said Gregg County, Texas, on said date. The train on which he acted as conductor was a freight train on the railway of the Texas & Gulf Railway Company. The said Texas & Gulf Railway Company is a corporation duly incorporated under and by virtue of the laws of the State of Texas. The railway of said The Texas & Gulf Railway Company extends from Longview, in Gregg County, Texas, through the counties of Gregg, Harrison, Rusk, Panola and Shelby to Waterman, in Shelby County, Texas, a distance of about

9 seventy five miles, and has another line extending from Gary, a point on the line before described, in Panola County, Texas, to Center, in Shelby County, Texas, a distance of about

twenty five miles, making the mileage of the entire railway of said Company about one hundred miles, or a little over, all of which is in Texas. The line of railway of the Texas & Gulf Railway Company is over one hundred miles lone, and is over twenty five miles in length, and was more than twenty five miles in length on July 22, 1910, and on said date was the same length it now is. The railway of The Texas & Gulf Railway Company was not less than twenty five miles in length on said July 22, 1910, and is not less than that length at the present time. I know that W. W. Smith has never served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad prior to July 22, 1910. I know the circumstances of his acting as a conductor on said freight train on said date, and know that he was not then and there acting as a conductor on a railroad train in case of the disability of a conductor while out on the road between division's terminals, and know that the said W. W. Smith was not then and there acting as a conductor on said railway train in case of emergency where the said The Texas & Gulf Railway Company could not obtain a person to act as conductor who had for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad. There was no emergency of any kind calling for the defendant to act as a conductor on said July 22, 1910. He acted as a conductor on a railway train in this State, the State of Texas, on that date and in Gregg County, Texas, and I saw him acting as such conductor and operating said train on said July 22, 1910, and saw him so acting as such conductor on said train in Gregg County, Texas.

Cross-examination:

The defendant in this case, W. W. Smith, has been working in the capacity of a locomotive engineer on the railway of The Texas & Gulf Railway Company for a number of years. He has been a fireman and engineer on a locomotive engine, and has been on engines in such capacities pulling freight trains, mixed trains and passenger trains. I understand the railroad business and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman. Under the rules of all railroads, and of The Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor on a train is made in duplicate and one copy of it is given to the conductor and the other to the engineer. It is a rule with Railway Companies that if anything should happen to disable the conductor or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows

how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the way bills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The way bills are plainly written and the destinations plainly given, and booking the waybills and delivering them with the cars is clerical, and can be done by any one that can read and write and who has ordinary sense. Every act that is to be done by the conductor toward the safe handling of the train also has to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer."

J. T. BYRNE, being duly sworn, testified in behalf of the defendant as follows: "I reside in Longview, in Gregg County, Texas, and have resided at said place for over two years. I am fifty-
11 four years old and have been in the railroad business about twenty-nine years. I am superintendent of The Texas & Gulf Railway Company and have held that position for about two years. I have been brakeman on a freight train, conductor on a freight train, railroad telegraph operator, train dispatcher, trainmaster, and railroad superintendent and I know the respective duties of engineers, firemen, conductors, and brakemen. A fireman or engineer on a freight train is in such position as to learn all of the requisite actions of a conductor to safely handle the train. An engineer receives the same orders that a conductor receives for the operation of the train. The engineer has to operate the engine to do all the backing up of the cars and switching cars and is in such position as to see every act that has to be done by the conductor toward the safe operation of the train. An engineer is held equally responsible with the conductor for the safe handling of the train. If a conductor becomes disabled or is otherwise relieved of his duties of the train while out on the road and the train at once goes into the hands of the engineer for operation and direction, and under the rules of all railway companies the engineer is to at once take charge of the train for its safe operation. If a man has fired an engine or a freight train for three or four years, and has operated an engine of a freight trains as engineer for three or four years he is well qualified to act as a conductor on a freight train as if he had served as brakeman for two years."

W. W. SMITH, the defendant, being duly sworn, testified in his own behalf, as follows: "My name is W. W. Smith. I reside in Center, Shelby County, Texas. I am forty seven years old. My present business is that of passenger engineer on The Texas & Gulf Railway. I have been in the railroad business for twenty two years.

My first service in the railroad business was twenty two years ago when I began firing a locomotive engine on the St. Louis, Iron Mountain & Southern Railway out of Little Rock, Arkansas. I held this position for three years, and then began running an engine on that road. I ran an engine on the St. Louis Iron Moutain & Southern Railroad for three years and then came to Longview,
12 where I began working in the shops of the Texas & Gulf Railway. I worked in the shops for one year. While firing and running an engine on the St. Louis Iron Mountain & Southern Railroad I was on engines pulling freight trains. After working in the shops at Longview for one year I went to firing locomotive engines and running extra as engineer on the Texas & Gulf Railway and continued in this service for three years. During that entire time I was on engines pulling freight trains. After that I went to running an engine regular as an engineer that pulled a mixed train, which was a train that carried both freight and passengers. I acted as engineer on this mixed train for eight years. I made a trip from Timpson to Longview and return, or from Longview to Timpson and return every day for eight years except when I would lay off, which was seldom. After that I began acting as engineer of a passenger train on The Texas & Gulf Railway, and have now been in that business for four years. I am holding this position and acting in the service of passenger engineer for The Texas & Gulf Railway Company at the present time. I pull a passenger train over The Texas & Gulf Railway from Longview to Center and return each day. Before the line to Center was completed I pulled a passenger train from Longview to Waterman and return each day. As fireman and engineer on engines pulling freight trains I learned all of the actions of a conductor in *hal*ding trains. I know everything that has to be done by a conductor for the safe operation of a train. I know all of the signals that have to be given and are given by all of the train men. I know all of the rules and regulations that pertain to the service of a conductor on a freight train. My reason for knowing them is the number of years I have been fireman and engineer on trains, in constant train work, and being directly associated with the conductors on trains in the service of operating trains. I acted as conductor on a line of railroad in Gregg County, Texas, on July 22, 1910. I acted as conductor on said date and as such conductor I brought a freight train from Carthage, Texas, to Longview, Texas. In said train I had fourteen cars of freight and two passenger coaches. In that train I transported from said Carthage, in Panola County, Texas, to Longview, in Gregg County, Texas, one car load of lum-
13 ber that originated at Waterman, in Shelby County, Texas, and destined to Caney, in the State of Kansas; one car load of boxes, originating at Carthage, Texas, and destined to Longview, Texas; one car load of ties, originating at Grigsby, Texas, and destined to Purcell, in the State of Oklahoma; four car loads of ties, originating at Stockman, in Shelby County, Texas, and destined to Purcell, in the State of Oklahoma; one car load of lumber originating at Stockman, Texas, and destined to Comanche, Texas; one car

load of lumber originating at Neuville, Texas, and destined to St. Louis, in the State of Missouri; one car load of lumber, originating at Brookeland, Texas, and destined to Sentinel, Oklahoma; one car load of lumber originating at Brookeland, Texas, and destined to Nashville, Kansas; one car load of lumber originating at Brookeland, Texas, and destined to Keachie, Kansas; one car load of lumber originating at Brookeland, Texas, and destined to Tulsa, Oklahoma; and one car load of lumber originating at Brookeland, Texas, and destined to Wichita, Kansas. On said train on which I acted as conductor I handled twelve car loads of interestate freight and two car loads of intra-state freight. I had never acted as brakeman or conductor on a line of railway at any place prior to July 22, 1910, and never served or worked in any way as a brakeman or conductor, on a freight train or any other train prior to July 22, 1910. I was employed by The Texas & Gulf Railway Company to act as conductor on said train on July 22, 1910, and did so upon the direction of the Superintendent of the Texas & Gulf Railway Company. I operated said freight train from Carthage to Longview on July 22, 1910, with safety, and knew how to perform all of the details of the work as conductor in bringing said train to Longview. No accident occurred to the train, and I brought the same to Longview as conductor at the usual time. I fully understood every part of the work to be done by me as conductor before I took charge of the train, and in operating the train as conductor, I did not find any duties to perform other than what I knew anything about. I handled the train with east and with safety and knew exactly how to handle it before I took charge of it. I had never acted as conductor or brakeman on a freight train, or any other train, prior to that time, and had never had two
14 years' experience prior to that time as a brakeman or conductor, and had never had any experience prior to that time as a brakeman or conductor."

We, the parties to the above cause, through our attorneys agree that the foregoing are the facts and all the facts adduced in evidence on the trial of said cause by the respective parties thereto, and agree that the same may be filed as the statement of facts in said cause.

W. C. SHOULTS,
County Attorney of Gregg County, Texas.
YOUNG & STINCHCOMB,
Attorneys for the Defendant.

The parties to this cause having agreed to the foregoing as the statement of facts in said cause, and I having examined the same and found it correct, hereby approve the same as the statement of facts in said cause and order it filed as a part of the record.

J. H. McHANEY,
Judge of the County Court of Gregg County, Texas.

Endorsed: No. 1990. State of Texas v. W. W. Smith. Statement of Facts. Filed July 30, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

THE STATE OF TEXAS
v.
W. W. SMITH.

Charge of the Court.

GENTLEMEN OF THE JURY: In this case the defendant W. W. Smith is on trial, charged by information filed in this Court on the 23rd day of July, 1910, with the offense of unlawfully acting as a conductor on a railroad train in this State without having for two years prior thereto served or worked in capacity of a brakeman or conductor on a freight train on a line of railroad, and to this charge he has pleaded not guilty.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt of the defendant's guilt you will acquit him.

Now bearing in mind these instructions, if you find and believe from the testimony, beyond a reasonable doubt, that the defendant on or about the time alleged in the bill of information, in Gregg County, Texas, did act as a conductor on a railroad train in this State, and that the same was a freeight train on the railroad of The Texas & Gulf Railway Company, and that the said The Texas & Gulf Railway Company was at that time a corporation duly incorporated under and by virtue of the laws of the State of Texas, and that the said defendant had not for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and that the said defendant was not then and there acting as a conductor on said railroad train in case of the disability of a conductor while out on the road between division terminals, and that the said defendant was not then and there acting as a conductor on said railroad train in case of an emergency where the said The Texas & Gulf Railway Company could not obtain a person to act as conductor who had for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and that the said defendant was not then and there acting as a conductor on a railroad train in this State on a line of railway less than twenty five miles in length, and that the line of railway of the said The Texas & Gulf Railway Company at that time was not less than twenty five miles in length, you will find the defendant guilty and assess his punishment at a fine of not less than twenty five dollars ($25.00) nor more than five hundred dollars ($500.00) but if you fail to so find you will find the defendant not guilty.

You are the exclusive judges of the facts in evidence, the credibility of the witnesses, and the weight to be given to the testimony.

but as to the law you will be governed by the written instructions given you by the Court.

16 Let your verdict be in writing on the back of the information, and signed by a foreman selected by you, and as you find return into open Court.

J. H. McHANEY,
Judge Presiding.

Endorsed: No. 1990. State of Texas vs. W. W. Smith. Charge. Filed July 25, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Defendant's Special Charge No. One.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
vs.
W. W. SMITH.

Special Charge No. One Requested by the Defendant.

Gentlemen of the Jury: You are charged to return a verdict finding the defendant not guilty.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

Refused,
J. H. McHANEY,
Judge Presiding.

Endorsed: No. 1990. State of Texas vs. W. W. Smith. Def't's Special Charge No. One. Filed July 25", 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Defendant's Special Charge No. Two.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
v.
W. W. SMITH.

Special Charge No. 2 Requested by the Defendant After the Court Had Refused the Defendant's Special Charge No. One and Had Read His Main Charge to the Jury.

Gentlemen of the Jury: If you find from the testimony that the defendant on the occasion in question, while he was acting as

conductor on July 22, 1910, had charge of inter-state Commerce
that was being transported on the train he was operating,
17 you will find the defendant not guilty.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

Refused.

J. H. McHANEY,
Judge Presiding.

Endorsed: No. 1990. State of Texas vs. W. W. Smith. Defendant's Special Charge No. 2. Filed July 25, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Defendant's Special Charge No. Three.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
v.
W. W. SMITH.

Special Charge No. 3 Requested by the Defendant.

Gentlemen of the Jury: If you find from the testimony that the defendant on July 22, 1910, the time he is charged to have acted as a conductor on a line of railroad in this State, was well qualified and competent to act as a conductor on a freight train you will return a verdict finding the defendant not guilty.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

Refused.

J. H. McHANEY,
Judge Presiding.

Endorsed: No. 1990. State of Texas v. W. W. Smith. Defendant's special charge No. 3. Filed July 25, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Defendant's Special Charge No. Four.

No. 1990.

In the County Court of Gregg County, Texas, July Term, 1910.

STATE OF TEXAS
v.
W. W. SMITH.

Special Charge No. 4 Requested by the Defendant.

Gentlemen of the Jury: If you find from the testimony that the defendant, prior to the time he acted as conductor on July —, 1910, had experience as a locomotive fireman and engineer, and that he had fired engines pulling freight trains for about three years, and that he had operated locomotive engines pulling mixed
18 trains about eight years, and that he had operated locomotive engines pulling passenger trains about four years, and that in such capacities he had learned how to operate a freight train as a conductor, and that he was, on July 22, 1910, when he acted as conductor on said freight train, well qualified and competent to act as a conductor on a freight train, and to safely operate a freight train, and that he did safely and properly operate said train on July 22, 1910, you will find the defendant not guilty.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

Refused.

J. H. McHANEY,
Judge Presiding.

Endorsed: No. 1990. State of Texas vs. W. W. Smith. Defendant's Special Charge No. 4. Filed July 25, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Defendant's Motion for a New Trial.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
vs.
W. W. SMITH.

Now comes the defendant in the above styled and numbered cause, and moves the Court to set aside the verdict returned and judgment of conviction rendered thereon in this said cause on July 25th, 1910, for the following reasons, towit:

I.

The court erred in overruling the defendant's motion to quash the information in said cause, because:

(1.) Chapter 46 of the laws of the Thirty First Legislature of the State of Texas, the same being enacted in the year 1909, by the Legislature of the State of Texas, is unconstitutional.

(2.) The said law under which this information is drawn is in violation of the Bill of Rights as incorporated in the Constitution of the State of Texas, in that it is an interference with the personal liberties of the Texas and Gulf Railway Company and the defendant in this case, and with other railway companies and indi-
19 viduals, and prevents them from exercising their constitutional rights of making contracts.

(3.) The said Acts of the Legislature under which this information is drawn is in violation of the provisions of the Bill of Rights, and is in violation of both Federal and State Constitutions, in that it prevents the free right of contract on the part of railway companies and individuals, and it prevents a man from earning a livelihood, and from voluntarily engaging in an avocation of life to which he is well adapated, and is an unreasonable, unwarranted and unnecessary interference with the rights of persons to make contracts for employment, and tends to deprive citizens of the right to make an honest living in callings that they have voluntarily selected and are capable of pursuing.

(4.) The said law under which this information is drawn indicates a spirit of pernicious activity and despotic paternalism which is repugnant to our free institutions.

(5.) The said law under which this information is drawn is class legislation, in that it attempts to prescribe the qualifications of employees of railway companies, railway operators and receivers, but of no other persons or institutions.

(6.) The said law under which this information is drawn is in violation of the Constitution of the State of Texas, and of the Constitution of the United States, because the same is an unnecessary interference with the duties of the Railroad Companies in this State, their operators and receivers, in that it is the duty of each and every railroad company, railroad operator and receiver, to exercise the highest degree of care for the safe transportation of their passengers, and to exercise ordinary care for the safety of their employees, and is an insurer of the safe transportation of merchandise entrusted to them, and the said act of the Legislature interferes with the railroad companies, railroad operators and receivers, in their right to make free choice of the agents and employees to represent them in carrying out their obligations to their patrons, their employees and the public.

(7.) The said Act of the Legislature is in violation of the Constitution of the United States and the Constitution of the
20 State of Texas in that it prevents Railway Companies that are common carriers from employing men well qualified to act as conductors and engineers that have not served the time prescribed in the said act as conductors and engineers, and thereby re-

stricts the Railway Companies in their right to employ capable and qualified men in such positions for the purpose of assisting the said Railway Companies in performing their duties to the public, the State, the United States Government, their patrons and employees.

(8.) The said Act of the Legislature is an interference with interstate commerce.

(9.) The passage of the act of the Legislature under which this prosecution is being pushed is an undue interference on the part of the Legislature with the right of contract.

(10.) The act of the Legislature under which this prosecution is being pushed is an unreasonable and unnecessary exercise of what is known as the police power of the State.

(11.) The said act of the Legislature is in violation of the Constitution of the State of Texas, in that it provides special privileges to persons who have served or worked in the capacity of a brakeman or conductor on a freight train for two years prior to the time of asking for employment as a conductor, and because it is a law impairing the obligation of contracts and preventing the free right of contract for labor between parties, and because it deprives citizens of this State of the privilege of making contracts for service and entering into and performing services for which they are adapted.

(12.) The said act of the Legislature is in violation of the Constitution of the United States, in that it is an interference with interstate commerce, which, under the Constitution of the United States, the Congress of the United States has entire authority to regulate and control, and because the same impairs the obligation of contracts, and prevents the free right of making contracts between persons of said nation.

II.

21 The court erred in refusing to give the jury the defendant's special charge No. 1 which was a peremptory instruction to find the defendant not guilty, because:

(1.) The uncontradicted evidence shows that when the defendant acted as conductor of a freight train, and the only time he acted as such conductor, he had charge of interstate traffic, and was moving commerce from points or places in the State of Texas to destinations in other states, and that the act of the Legislature under which he was tried and convicted is in violation of the United States Constitution, and an interference with interstate commerce.

(2.) The act of the Legislature under which the defendant was tried and convicted is in violation of the Bill of Rights as incorporated in the Constitution of the State of Texas, in that it impairs the obligation of contracts, and prevents the free right of contract between individuals, corporations, and between corporations and individuals, and because the same prevents individual persons from making contracts for the purpose of earning a livelihood, and prevents the free rights of persons to enter into occupations or callings that they are capable of pursuing.

(3.) The act of the Legislature under which the defendant was tried and convicted is in violation of the Constitution of the United

States, in that it is an interference with the personal liberty of individuals and corporations, in that it impairs the obligation of contracts, and prevents the free right to contract on the part of Railway Companies and individuals, and prevents a man from earning a livelihood in avocations of life to which he is well adapted, and prevents a man from entering into service in an occupation of his choice and of which he is capable of pursuing.

(4.) The act of the Legislature under which the defendant was tried and convicted is class legislation in that it attempts to prescribe qualifications of employees of Railway Companies, Railway operators and receivers, but of no other persons or institutions.

(5.) The said act of the Legislature under which the defendant was tried and convicted is in violation of the Constitution of the State of Texas, and of the United States, in that the same prevents Railway Companies, operators and receivers, from exercising their free right of contract for employés to assist them in carrying out their duties to the public, their patrons, and their em-
22 ployees, in that it is the duty of each railway company, railway operator, or receiver, to exercise the highest degree of care for the safe transportation of its passengers, to exercise ordinary care for the safety of its employés, to exercise ordinary care for the safety of its employés, and to insure the safe transportation of freight, and the said railway companies, railway operators, and receivers, should have the right to choose their own agents to carry out these duties to the public, their patrons and employees, and that the act of the Legislature referred to interferes with their right of contract for dutiful and qualified agents of their choice.

(6.) The uncontradicted evidence shows that the defendant was, on July 22, 1910, a man of proper age, and possessed all knowledge and capacity that could possibly be acquired by having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and that he more than possessed every qualification that such work or service as railroad brakeman or conductor for two years prior thereto would have given an extra intelligent mind, and that when he operated the train he did so in the same manner that the most qualified conductor could operate it.

(7.) The said act of the Legislature is in violation of the Constitution of the State of Texas, in that it provides special privileges to persons who have served or worked in the capacity of a brakeman or conductor on a freight train for two years prior to offering for employment as a railroad conductor, and because it is a law impairing the obligation of contracts, and preventing the free right of contract for labor between all persons, and because it deprives citizens of this State of privileges of making contracts for service and entering into and performing services for which they are adapted.

(8.) The said act of the Legislature is in violation of the Constitution of the United States in that it is an interference with interstate commerce, which, under the Constitution of the United States, the Congress of the United States has entire authority to regulate

and control, and because the same impairs the obligation of
23 contracts, and prevents the free right of making contracts between persons of said nation.

III.

The court should grant the defendant a new trial because the uncontradicted testimony shows he was in every way qualified to operate the said train, and possessed all of the qualifications that two years' service prior thereto as brakeman or conductor on a freight train on a railroad could have given him, and because the act of the Legislature under which he was tried and convicted is in violation of the Constitution of the United States, and of the Constitution of the State of Texas, in that it impairs the obligation of contracts, and is an interference with the right of contract, and the uncontradicted evidence shows that the defendant, while acting as conductor, was transporting interstate commerce.

IV.

The court erred in his main charge wherein he instructed the jury to find the defendant guilty if they should find that he did act as a conductor on the railroad of the Texas & Gulf Railway Company on or about the time charged in the bill of information, because the act of the Legislature under which he was tried and convicted is in violation of the Constitution of the State of Texas, and of the Constitution of the United States, and that it impairs the obligation of contracts, and prevents the free right of contract, and because the uncontradicted evidence shows that the defendant, while acting as a conductor, was transporting interstate commerce.

V.

The Court erred in refusing to give to the jury special charge No. 2 requested by the defendant, which is as follows: "If you find from the testimony that the defendant on the occasion in question, while he was acting as conductor on July 22, 1910, had charge of interstate commerce that was being transported on the train he was operating, you will find the defendant not guilty," because the uncontradicted testimony showed that there were fourteen cars of freight in the train and that twelve of the cars were loaded
24 with freight that originated in Texas, and was being transported to destinations in other States, and therefore interstate commerce, and that therefore the act of the Legislature under which the defendant was tried and convicted is an interference with interstate commerce, and is in violation of the Constitution of the United States, in that the said Constitution of the United States reserves to the Congress of the United States all power to regulate commerce between States.

VI.

The court erred in refusing to give to the jury special charge No. 3 requested by the defendant, which is as follows: "If you find from

the testimony that the defendant on July 22, 1910, the time he is charged to have acted as a conductor on a line of railroad in this State, was well qualified and competent to act as a conductor on a freight train, you will return a verdict finding the defendant not guilty, "because the uncontradicted testimony shows that the defendant, at the time he acted as conductor, was well qualified and competent to do so.

VII.

The court erred in refusing to give to the jury special charge No. 4 requested by the defendant, which is as follows:

"If you find from the testimony that the defendant, prior to the time he acted as conductor on July 22, 1910, had experience as a locomotive fireman and engineer, and that he had fired engines pulling freight trains for about three years, and that he had operated locomotive engines pulling mixed trains about eight years, and that he had operated locomotive engines pulling passenger trains about four years, and that in such capacities he had learned how to operate a freight train as a conductor, and that he was on July 22, 1910, when he acted as conductor on said freight train, well qualified and competent to act as a conductor on a freight train, and to safely operate a freight train, and that he did safely and properly operate said train on July 22, 1910, you will find the defendant not guilty," because the uncontradicted testimony shows that prior to July 22, 1910, the defendant had twenty two years' experience as a locomotive engineer and fireman in the capacities stated in said charge, and that all during the time he served or worked in the capacity of engineer or fireman he was on locomotives that pulled freight trains, and was directly associated with the conductor's work on freight trains, and that his service was such as to teach him, all the duties and responsibilities of a conductor of a freight train, and that he was well qualified and competent to act as a conductor on a freight train, and that he safely and properly operated the train he was running on July 22nd, 1910, and the jury should have been instructed that if they so found they should acquit him.

YOUNG & STINCHCOMB,
Att'ys for Defendant.

Endorsed: No. 1990. State of Texas v. W. W. Smith. Defendant's Motion for a New Trial. Filed 26th day of July, 1910. Dush Shaw, Clerk of the County Court of Gregg County, Texas.

Judgment Overruling Motion for New Trial.

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
v.
W. W. SMITH.

On this the 30th day of July, 1910, this cause was called and thereupon came on to be heard the defendant's motion for a new trial, and the same having been heard and considered, it is the opinion of the Court that it should be overruled. It is therefore considered, ordered and adjudged by the Court that the defendant's motion for a new trial be and is hereby in all things overruled. To which ruling and judgment of the Court the defendant in open Court excepts and gives notice of appeal to the Court of Criminal Appeals of the State of Texas, and upon motion of the defendant it is hereby ordered that thirty days after this date are allowed in which to file a statement of facts and all bills of exceptions in this said cause.

26 *Order Fixing Amount of Recognizance.*

In the County Court of Gregg County, Texas, July Term, 1910.

No. 1990.

STATE OF TEXAS
v.
W. W. SMITH.

On this the 30th day of July, A. D. 1910, in this cause it is ordered that the amount of recognizance for the appeal of the defendant be and is hereby fixed by the Court at two hundred dollars ($200.00) and that the sureties presented are qualified to enter into the recognizance and are satisfactory to the Court.

Recognizance.

In the County Court of Gregg County, Texas, July 30", 1910.

No. 1990.

STATE OF TEXAS
v.
W. W. SMITH.

This day came into open Court W. W. Smith, defendant in the above entitled cause, who, together with E. H. Pruitt and W. S.

Mann, his sureties, acknowledge themselves severally indebted to the State of Texas in the penal sum of two hundred dollars ($200.00) conditioned that the said W. W. Smith, who has been convicted in this cause of a misdemeanor, and his punishment assessed at a fine of twenty five dollars ($25.00) as more fully appears by the judgment of conviction duly entered in this cause, shall appear before this Court from day to day, and from term to term of the same, and not depart without leave of this Court, in order to abide the judgment of the Court of Criminal Appeals of the State of Texas in this cause.

27

Bill of Costs.

Cost due County Clerk:

Docketing cause	.25	
Issuing Capias	.75	
Entering appearance	.15	
Swearing & empanelling jury & receiving verdict	.50	
Swearing three witnesses	.30	
Entering judgment overruling motion to quash	.50	
Entering judgment	.50	
Filing 10 papers	1.00	
Entering recognizance	.50	
Commitment	1.00	
Preparing transcript 9,000 words at 10¢ per hundred	9.00	
Total Cost due Co. Clerk		$14.45

Cost due Sheriff:

Arrest and Bond	2.00	
Commitment	1.00	
Total Cost due Sheriff		$3.00
Fine		$25.00
Jury fee		5.00
Trial fee		5.00
Total Amount of Fine & Costs		$52.45

Clerk's Certificate.

THE STATE OF TEXAS,
County of Gregg:

I, Dush Shaw, Clerk of the County Court of Gregg County, Texas, do hereby certify that the foregoing 26 pages of transcript contains a true copy of all of the proceedings had in the county court of Gregg County, Texas, in cause No. 1990 of the State of Texas vs. W. W. Smith, in said County Court of Gregg County, Texas.

Given Under My Hand and Seal of said Court on this the 15th day of September, A. D. 1910.

(Signed) DUSH SHAW,
[SEAL.] *Clerk of the County Court of Gregg County, Texas.*

(Endorsed:) No. 867. W. W. Smith, appellant, vs. The State of Texas, appellee. From the County Court of Gregg County. Applied for by Young & Stinchcomb on the 30 day of July, 1910, and delivered to E. P. Smith, Clerk Court Criminal Appeals on the 30 day of September, 1910. Dush Shaw, Clerk of the County Court of Gregg County. Filed in Court of Criminal Appeals Oct. 1, 1910. E. P. Smith, Clerk.

28 *Order Submitting Case.*

WEDNESDAY, *November* 30, 1910.

No. 867.

W. W. SMITH, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County.

Submitted on briefs and oral arguments for both parties.

Judgment.

WEDNESDAY, *December 13th, A. D.* 1911.

867.

W. W. SMITH, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County. Affirmed. Opinion by Prendergast, Judge.

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant and his sureties on recognizance E. H. Pruitt and W. S. Mann pay all costs incurred in this Court, and that this decision be certified below for observance.

29 *Opinion.*

No. 867.

W. W. SMITH, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County.

The appellant was prosecuted, tried and convicted under section 2 of the Act of March 11, 1909, p. 92, and fined $25.00 in that on July 22, 1910, he did unlawfully act as a conductor on a railroad freight train of the Texas & Gulf Railway Company, in this State, which railroad company was a corporation duly incorporated under the laws of Texas, without having for two years prior thereto served, or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he not then acting as such conductor on said train in case of the disability of a conductor while out on the road between divisional terminals, and not acting as a conductor on said train in case of an emergency where the said railway company could not obtain a person to act as conductor who had for two years prior thereto served, or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad and not acting as conductor on said train in this State on a line of railway less than twenty-five miles in length; the said Texas & Gulf Railway Company at that time not being less than twenty-five miles in length.

Said section 2 of said act is: "If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense."

Sections 4 and 4*a* thereof are: "Sec. 4. Nothing in this Act shall be construed as applying to the running or operating of engines, in taking said engines to or from trains at division terminals by engine hostlers, or of the shifting of cars or making up trains,
30 or doing any work appurtenant thereto at engine houses, tram or freight yards by switchman or yardman, or in the case of the disability of an engineer or a conductor while out on the road between division terminals. In case of emergency where such companies cannot obtain the employés mentioned in this Act who have the qualifications prescribed by this Act, but no such employment shall continue longer than such companies can supply their respective places with men who have the qualifications prescribed by this Act, and provided further, that nothing herein contained shall relieve any of such companies from the negligence of any of its employés.

"SEC. 4*a*. The provisions of this Act shall not apply to any railroad company within this State or the receiver, lessee thereof, whose line of railway is less than twenty-five miles in length."

"Section 5 states, in substance: "The fact that there are now no adequate laws in this State prohibiting the running of * * * trains on railroads by inexperienced * * * conductors, thus endangering the lives of the traveling public and employés of said railroads, creates an emergency and an imperative public necessity requiring the suspension of the constitutional rule, which requires bills to be read on three several days in each House," then enacts that such rule is suspended and that the act take effect from its passage.

The proof, without contradiction, shows all of the facts alleged against appellant in accordance with the said law.

The appellant proved in addition thereto that he had been working in the capacity of a locomotive engineer on the railway of said railway company for a number of years; that he had been a fireman and engineer on a locomotive engine and had been on engines in such capacity, pulling freight trains, mixed trains and passenger trains. That a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor and that acting as an engineer on a freight train will better acqu-it- one with the knowledge of how to operate a freight train than acting as a brakeman. That under the rules of all
31 railroads, and of said railway company, the engineer is held equally responsible with the conductor for the safe operation of all the trains. All orders are given to the engineer as well as to the conductor; every order sent to a conductor on a train is made in duplicate and one copy is given to the conductor, and the other to the engineer; that if anything should happen to disable the conductor or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal; the engineer is constantly with the train and knows all the signals, knows how the couplings are made, the cars switched, and distributed, and how they are taken into train and transferred from one place to another and is so constantly associated with all the work of the conductor that he should know as much about how the freight train should be operated by a conductor as the conductor himself. All acts of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling way-bills and ascertaining the destinations of the cars in his train is easy and plain and it does not take a person that has had experience as a conductor to understand that part of his service. The way-bills are plainly written and the destinations are plainly given, and booking the way-bills and delivering them with the cars is clerical, and can be done by any one that can read and write and who has ordinary sense. Every act that is done by the conductor toward the safe handling of the train also has to be done by the engineer and all of the conductor's acts with reference to this are in the view and observation of the engineer.

The appellant himself testified, and was not disputed; that he was forty seven years old; that his business at that time was passenger engineer on the said railway. His first service in railroad business was twenty two years prior thereto when he began firing a locomotive engine on the St. Louis Iron Mountain & Southern Railway out of Little Rock, Arkansas, which position he held for three years and then began running an engine on that road which he did for three years, and then came to Longview, in Gregg County,
32 where this prosecution was had, where he began working in the shops of said Texas & Gulf Railway Company and worked at that one year. While firing and running an engine on said Iron Mountain Railroad he was on engines pulling freight trains. After working in the shops at Longview for one year he went to firing locomotive engines and running extra as engineer on said Texas & Gulf Railway Company and continued in that service for three years. During that entire time he was on engines pulling freight trains; after that he went to running an engine regularly as an engineer that pulled a mixed train, which carried both freight and passengers. He continued in this service eight years and ran from Timpson to Longview, and returned every day for eight years, except when laid off, which was seldom. After that he acted as engineer of a passenger train on the same road and had been in that business and holding that position for four years at the time of the trial. As fireman or engineer on engines pulling freight trains, he learned all the acts of the conductor in handling trains and knew everything that had to be done by a conductor for the safe operation of a train; knew all the signals to be given and that are given by all of the train men; knew all the rules and regulations that pertain to the service of a conductor on a freight train; learned all this by having been fireman and engineer on trains in constant train work and directly associated with conductors on trains in the service of operating trains; that he acted as conductor on said railroad in Gregg County, on July 22, 1910, as conductor thereon and brought said train from Carthage to Longview, (a distance greater than 25 miles); that in said train were fourteen cars of freight and two passenger coaches. He then showed that in that train were some cars containing freight destined to places in Kansas, Oklahoma, Missouri, all originating in Texas, besides other cars containing local freight for places in Texas. Also that he never acted as brakeman or conductor on a line of railway at any place prior to July 22, 1910, and never served or worked in any way as a brakeman or conductor on a freight or other train prior to July 22, 1910; that he was employed by said Texas & Gulf Railway Company to act as conductor on said train July 28, 1910, and did so upon the direction of
33 the Superintendent thereof. That he operated said train from Carthage to Longview on said date with safety, and knew how to perform all the details of the work as conductor thereof; that no accident occurred to the train and he brought it in at the usual time; that he fully understood ever- part of the work to be done as conductor before he took charge of the train and in the operation as conductor he found no duties to perform other than

what he knew about; that he had never acted as a conductor or brakeman on a freight or other train prior to that time and never had had two years' experience prior thereto as a brakeman or conductor and had never had any experience prior to that time as a brakeman or conductor.

The appellant in several ways, which were altogether regular and proper, attacked the prosecution and conviction, substantially on the grounds, that the said act of the Legislature was unconstitutional and void, and in violation of both the Federal and State Constitutions, because it prevents the free right of contract on the part of railway companies and individuals, and prevents one from earning a livelihood and from voluntarily engaging in an avocation of life to which he is well adapted, and is an unreasonable unwarranted and unnecessary interference with the rights of persons to make contracts for employment, and tends to deprive citizens of the right to make an honest living in callings that they have voluntarily selected and are capable of pursuing.

He also attacked the said act of the Legislature and his conviction, claiming the said act was an unlawful interference with inter State commerce.

These points are raised by appellant and restated in substance over and over again, and properly raised the said questions. We deem it unnecessary to give in detail their various objections which are but repetitions in different language and different form of the same thing.

We also deem it unnecessary to discuss in detail and separately these questions, but will pass upon them together.

There is no question but that this act of the Legislature was intended to be within the police power of the State. In the
34 case of Lochner v. New York, 198 U. S. 53, in passing on the constitutionality of an act of the State of New York prohibiting employés of bakers from working longer than sixty hours a week and ten hours a day, the Supreme Court of the United States, in discussing the police power of a State and the validity of said act under the Federal Constitution, among other things, said: "There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without at present any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34, L. ed. 519; 10 Sup. Ct. Rep. 930; Crowley v. Christensen, 137 U. S. 86, 34 L. Ed. 620; 11 Sup. Ct. Rep. 13; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

"The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Fed-

eral Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment."

Again the Supreme Court of the United States, in Nashville, etc. R. R. Co. v. Alabama, 128 U. S. 93, among other things, said: "Indeed, it is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

35 "In Smith v. Alabama this court, recognizing previous decisions where it had been held that it was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the power of Congress over those subjects, very pertinently inquired: 'What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasions by the negligence of the carrier in not providing safe and suitable vehicles, or employés of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them? Of course but one answer can be made to these inquiries, for clearly what the State may punish or afford redress for, when done, it may seek by proper percautions in advance to prevent. And the court in that case held that the provisions in the statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with an express enactment of Congress in the exercise of its power over commerce, and that until so displaced they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the

36 State, or in commerce among the States. The same observations may be made with respect to the provisions of the State law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore

cannot be called, within the meaning of the Constitution, a regulation of commerce. As said in Sherlock v. Alling, 93 U. S. 99, 104 (23; 919) legislation by a State of that character 'relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit!"

In that case an act of the Legislature of Alabama required persons to be examined for color blindness and prohibited only such as passed such examination from serving in certain capacities on railroads.

The act of the Legislature of this State requiring the appointment, under certain conditions, of pilots, and prohibiting others from following or engaging in that business, has been sustained not only by the courts of this State but by the Supreme Court of the United States (Peterson v. Board, 67 S. W. 1002; Olsen v. Smith, 68 S. W. 320; same case 195 U. S. 232.) Also the courts of this State have uniformly sustained the acts of the Legislature thereof providing for public weighers in certain cities and towns thereof, and prohibiting others from engaging in such business, even though they were competent and able to engage therein and had theretofore earned and were then engaged in earning a living by pursuing such business (Davidson v. Sadler, 577 S. W. 54; Johnson v. Martin, 75 Texas, 33). Also the courts of this State have upheld the constitutionality of the acts of the Legislature and of the cities of Texas prohibiting and making it a penal offense for any other than the agent of a railroad company to sell passenger tickets (Janning v. State, 42 Texas Crim. Rep. 631; Ex parte Hughes, 100 S. W. 160. See also Dankworth v. State, 136 S. W. 788).

It may be, that others than those authorized under said act of the Legislature in discussion herein, may be just as competent to
37 act as conductors, as those authorized by said act. In fact, they might be better qualified, and it might be contended that the Legislature ought to have permitted other persons, shown to be so competent by other means than those only authorized by this to act as such conductor. But this court has no power or authority to substitute its opinion for that of the Legislature. This is held by all of the authorities. There is no contention in this case that the experience and knowledge gained by a brakeman, who runs on freight trains for two years, or who has acted as conductor for two years on a freight train, has not thereby gained a knowledge and experience that would fit him in every way thereafter to act as conductor on a train. That someone else may be equally qualified would not show that the Legislature had no power or authority to prohibit any other from pursuing such business. It is in effect the laws of all the States that no one can practice law, as an attorney, or practice medicine as a physician, who does not stand examination and procure a license to do so, and there are regulations of numerous professions, occupations and businesses, that can not be pursued under the laws, unless the persons desiring to do so stand certain ex-

aminations and procure a license or permission authorizing it. Others equally as qualified, or probably more so, than those who are thus authorized, are prohibited from engaging in such professions or occupations, and such laws are universally upheld.

We deem it unnecessary to cite text book authorities or cases further on this subject. Recognizing and applying the well known universal rule that the courts must presume that an act of the Legislature is valid unless clearly shown to be unconstitutional it is our opinion that the act of the Legislature attacked in this case is not unconstitutional on any of the grounds claimed by the appellant, nor does it unlawfully interfere with interstate commerce or undertake to regulate such commerce.

The judgment will, therefore, be affirmed.

PRENDERGAST, *Judge*.

(Delivered December 13, 1911.)

38 Endorsed: No. 867. W. W. Smith, appellant v. The State of Texas, appellee. Appeal from Gregg County. Affirmed. Opinion by Prendergast, Judge. Filed in Court of Criminal Appeals, December 13, 1911. E. P. Smith, Clerk.

In the Court of Criminal Appeals, State of Texas.

No. 867.

W. W. SMITH, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Appellant's Motion for Rehearing.

Now comes the appellant and files the following as his motion for a rehearing herein, representing that this Honorable Court has erred in overruling and failing to sustain his assignments of error, together with the propositions thereunder, which said assignments and propositions were, and are as follows:

I.

"The court erred in overruling the defendant's motion to quash the information in said cause, because:

"(1). Chapter 46 of the Laws of the Thirty-first Legislature of the State of Texas, the same being enacted in the year 1909 by the Legislature of the State of Texas, is unconstitutional.

"(2). The said law under which this information is drawn is in violation of the bill of rights as incorporated in the Constitution of the State of Texas, in that it is an interference with the personal liberties of the Texas & Gulf Railway Company and the defendant in this case, and with the other railway companies and individuals, and prevents them from exercising their constitutional rights of making contracts.

"(3). The said act of the legislature under which this information is drawn is in violation of the provisions of the bill of rights, and is in violation of both Federal and State Constitutions, in that it prevents the free right of contract on the part of railway companies and individuals, and it prevents a man from earning a livelihood, and from voluntarily engaging in an avocation of life to which he is well adapted, and is an unreasonable, unwarranted and unnecessary interference with the rights of persons to make con-
39 tracts for employment, and tends to deprive citizens of the right to make an honest living in callings that they have voluntarily selected and are capable of pursuing.

"(4). The said law under which this information is drawn indicates a spirit of pernicious activity and despotic paternalism which is repugnant to our free institutions.

"(5). The said law under which this information is drawn is class legislation, in that it attempts to prescribe the qualifications of employés of railway companies, railway operators and receivers, but of no other persons or institutions.

"(6). The said law under which this information is drawn is in violation of the Constitution of the State of Texas, and of the Constitution of the United States, because the same is an unnecessary interference with the duties of the Railroad Companies in this State, their operators and receivers, in that it is the duty of each and every railroad company, railroad operator and receiver, to exercise the highest degree of care for the safe transportation of their passengers, and to exercise ordinary care for the safety of their employés, and is an insurer of the safe transportation of merchandise entrusted to them, and the said act of the legislature interfer-s with the railroad companies, railroad operators and receivers, in their right to make free choice of the agents and employés to represent them in carrying out their obligations to their patrons, their employés and the public.

"(7). The said act of the legislature is in violation of the Constitution of the United States and the Constitution of the State of Texas in that it prevents Railway Companies that are common carriers from employing men well qualified to act as conductors and engineers that have not served the time prescribed in the said act as conductors and engineers, and thereby restricts the railway companies in their right to employ capable and qualified men in such positions for the purpose of assisting the said railway companies in performing their duties to the public, the State, the United States Government, their patrons and employees.

40 "(8). The said act of the legislature is an interference with interstate commerce.

"(9). The passage of the act of the legislature under which this prosecution is being pushed is an undue interference on the part of the legislature with the right of contract.

"(10). The act of the legislature under which this prosecution is being pushed is an unreasonable and unnecessary exercise of what is known as the police power of the State.

"(11). The said act of the legislature is in violation of the Con-

stitution of the State of Texas, in that it provides special privileges to persons who have served or worked in the capacity of a brakeman or conductor on a freight train for two years prior to the time of asking for employment as a conductor, and because it is a law impairing the obligation of contracts and preventing the free right of contract for labor between parties, and because it deprives citizens of this State of the privilege of making contracts for service and entering into and performing services for which they are adapted.

"(12). The said act of the Legislature is in violation of the Constitution of the United States, in that it is an interference with interstate commerce, which, under the Constitution of the United States, the Congress of the United States, has entire authority to regulate and control, and because the same impairs the obligation of contracts, and prevents the free right of making contracts between persons of said nation."

II.

"The court erred in refusing to give the jury the defendant's special charge No. 1, which was a peremptory instruction to find the defendant not guilty, because:

"(1). The uncontradicted evidence shows that when the defendant acted as conductor of a freight train, and the only time, he was moving commerce from points or places in the State of Texas to destinations in other states, and that the act of the Legislature under which he was tried and convicted is in violation of the United States Constitution, and an interference with interstate commerce.

41 "(2). The act of the legislature under which the defendant was tried and convicted is in violation of the Bill of Rights as incorporated in the Constitution of the State of Texas, in that it impairs the obligation of contracts, and prevents the free right of contract between individuals, corporations and between corporations and individuals, and because the same prevents individual persons from making contracts for the purpose of earning a livelihood, and prevents the free rights of persons to enter into occupations or callings that they are capable of pursuing.

"(3). The act of the Legislature under which the defendant was tried and convicted is in violation of the Constitution of the United States, in that it is an interference with the personal liberty of individuals and corporations, in that it impairs the obligation of contracts, and prevents the free right to contract on the part of railway companies and individuals, and prevents a man from earning a livelihood in avocations of life to which he is well adapted, and prevents a man from entering into service in an occupation of his choice and of which he is capable of pursuing.

"(4). The act of the Legislature under which the defendant was tried and convicted is class legislation in that it attempts to prescribe qualifications of employés of railway companies, railway operators and receivers, but of no other persons or institutions.

"(5). The said act of the legislature under which the defendant was tried and convicted is in violation of the Constitution of the State of Texas, and of the United States, in that the same prevents

railway companies, operators, receivers, from exercising their free right of contract for employés to assist them in carrying out their duties to the public, their patrons, and their employés, in that it is the duty of each railway company, railway operator, or receiver, to exercise the highest degree of care for the safe transportation of its passengers, to exercise ordinary care for the safety of its employés, and to insure the safe transportation of freight, and the said railway companies, railway operators, and receivers, should have the right to choose their own agents to carry out these duties
42 to the public, their patrons and employees, and that the act of the legislature referred to interferes with their right of contract for dutiful and qualified agents of their choice.

"(6). The uncontradicted evidence shows that the defendant was, on July 22, 1910, a man of proper age, and possessed all knowledge and capacity that could possibly be acquired by having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, and that he more than possessed every qualification that such work or service as railroad brakeman or conductor for two years prior thereto would have given an extra-intelligent mind, and that when he operated the train he did so in the same manner that the most qualified conductor could have operated it.

"(7). The said act of the legislature is in violation of the Constitution of the State of Texas, in that it provides special privileges to persons who have served or worked in the capacity of a brakeman or conductor on a freight train for two years prior to offering for employment as a railroad conductor, and because it is a law impairing the obligation of contracts, and preventing the free right of contract for labor between all persons, and because it deprives citizens of this state of privileges of making contracts for service and entering into and performing services for which they are adapted.

"(8). The said act of the Legislature is in violation of the Constitution of the United States in that it is an interference with interstate commerce, which, under the Constitution of the United States, the Congress of the United States has entire authority to regulate and control, and because the same impairs the obligation of contracts, and prevents the free right of making contracts between persons of said nation.

"The above constituted the second ground of appellant's motion for a new trial, and is here now assigned as error with request that the eight paragraphs thereof be considered as propositions."

III.

43 "The Court should grant the defendant a new trial because the uncontradicted testimony shows he was in every way qualified to operate the said train, and possessed all of the qualifications that two years' service prior thereto as brakeman or conductor on a freight train on a railroad could have given him, and because the act of the legislature under which he was tried and convicted is in violation of the Constitution of the United States,

and of the Constitution of the State of Texas, in that it impairs the obligation of contracts, and is an interference with the right of contract, and the uncontradicted evidence shows that the defendant, while acting as conductor, was transporting interstate commerce.

"The above, which constituted the third ground of appellant's motion for a new trial, is now assigned as error with request that it be considered a proposition. Appellant likewise presents the same additional propositions as are stated in the eight paragraphs of its second assignment, without the necessity of repetition."

IV.

"The Court erred in his main charge wherein he instructed the jury to find the defendant guilty if they should find that he did act as a conductor on the railroad of the Texas & Gulf Railway Company on or about the time charged in the bill of indictment because the act of the legislature under which he was tried and convicted is in violation of the Constitution of the State of Texas, and of the Constitution of the United States, in that it impairs the obligation of contracts, and prevents the free right of contract, and because the uncontradicted evidence shows that the defendant, while acting as a conductor, was transporting interstate commerce.

"The appellant states the above as a proposition, and desires to present in addition thereto additional propositions which appear under its first, second and third assignments, if it is deemed proper, under the rules of this Court, to call them assignments; otherwise the propositions which appear in the first, second and third grounds of appellant's motion for a new trial."

44

V.

"The court erred in refusing to give to the jury special charge No. 2 requested by the defendant, which is as follows: "If you find from the testimony that the defendant, on the occasion in question, while he was acting as conductor on July 22, 1910, had charge of interstate commerce that was being transported on the train he was operating, you will find the defendant not guilty," because the uncontradicted testimony showed that there were fourteen cars of freight in the train and that twelve of the cars were loaded with freight that originated in Texas and was being transported to destinations in other states, and therefore interstate commerce, and that therefore the act of the legislature under which the defendant was tried and convicted is an interference with interstate commerce, and is a violation of the Constitution of the United States, in that the said Constitution of the United States reserves to the Congress of the United States all power to regulate commerce between states.

"The above is stated as a proposition."

VI.

"The court erred in refusing to give to the jury special charge No. 3, requested by the defendant, which is as follows: "If you find from the testimony that the defendant on July 22, 1910, the time

he is charged to have acted as a conductor on a line of railroad in this State, was well qualified and competent to act as a conductor on a freight train, you will return a verdict finding the defendant not guilty," because the uncontradicted testimony shows that the defendant, at the time he acted as conductor, was well qualified and competent to do so.

"The above is stated as a proposition, and appellant asks to have it so considered."

VII.

"The Court erred in refusing to give to the jury special charge No. 4, requested by the defendant, which is as follows: "If you find from the testimony that the defendant, prior to the time he
45 acted as conductor on July 22, 1910, had experience as a locomotive fireman and engineer, and that he has fired engines pulling freight trains for about three years, and that he had operated locomotives pulling freight trains about three years, and that he had operated locomotive engines pulling mixed trains about eight years, and that he had operated locomotive engines pulling passenger trains about four years, and that in such capacities he had learned how to operate a freight train as conductor, and that he was, on July 22, 1910, when he acted as conductor on said freight train well qualified and competent to act as a conductor on a freight train, and to safely operate a freight train, and that he did safely and properly operate said train on July 22, 1910, you will find the defendant not guilty, "because the uncontradicted testimony shows that prior to July 22, 1910, the defendant had twenty-two years' experience as a locomotive engineer and fireman in the capacities stated in said charge and that all during the time he served or worked in the capacity of engineer or fireman he was on locomotives that pulled freight trains, and was directly associated with the conductor's work on freight trains, and that his service was such as to teach all the duties and responsibilities of a conductor of a freight train, and that he was well qualified and competent to act as a conductor on a freight train, and that he safely and properly operated the train he was running on July 22, 1910, and the jury should have been instructed that if they so found they should acquit him.

"The above is stated as a proposition, and appellant presents the same additional propositions thereunder as those appearing under its second and third assignments."

Wherefore, appellant presents this, his motion for rehearing, and represents to the Court that before the submission thereof he will file in support of same a written argument. Appellant asks that service of this motion be had in terms of law, and that on hearing same be granted and relief granted, as prayed for in original brief.

Respectfully submitted,

TERRY, CAVIN & MILLS,
YOUNG & STINCHCOMB,
A. H. CULWELL,
46 *Attorneys for Appellant W. W. Smith.*

Endorsed: No. 867. W. W. Smith, appellant vs. The State of Texas, appellee. Motion for rehearing. Filed in Court of Criminal Appeals. Dec. 21, 1911. E. P. Smith, Clerk. By J. B. Cave, Deputy.

Order Submitting Motion for Rehearing.

WEDNESDAY, *January 10th, A. D.* 1912.

No. 867.

W. W. SMITH, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County.

Submitted on the appellant's motion for rehearing.

Order Overruling Motion for Rehearing.

WEDNESDAY, *May 1st, A. D.* 1912.

No. 867.

W. W. SMITH, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County

Rehearing Overruled.

Opinion by Prendergast, J.

This cause came on to be heard on the appellant's motion for rehearing, and the same being considered it is ordered and decreed by the Court that the said motion for rehearing, be and the same is hereby overruled.

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No. 867.

W. W. SMITH, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Appeal from Gregg County.

Opinion of Court Overruling Rehearing.

By his motion for rehearing appellant presents and urges all of the grounds originally contended for by him.

However, in his argument on the motion, as we understand it, he presents and urges two leadings, if not sole, questions for re-consideration. It is unnecessary to again discuss the questions at length.

One of his contentions now is, that because the act of the Legislature in question exempts all railroads with a less mileage than twenty-five miles from the operation of the act, that the act is thereby void and unconstitutional. As we understand, the authorities, both text books, and decisions of all the courts where the question is raised and discussed, this question is held against appellant's contention. It is expressly so held by the Supreme Court of the United States in the cases of N. Y. etc. R. R. Co. v. N. Y. 165 U. S. 628, and Consolidated Coal Co. v. Ill., 185 U. S. 203. We think it unnecessary to cite other authorities.

Appellant's other contention, in effect, is that said act of the Legislature is unconstitutional, because it interferes with the personal liberty of the railroads and individuals and prevents them from exercising their constitutional right of making such contracts as they desire. This act of the Legislature and no other law of this State, known to us, restricts the right or prevents anyone from qualifying himself to become a conductor by working as a brakeman for the two years required by this act. In fact, every person has the right to seek and obtain the employment of brakeman and thereby qualify himself for the position of conductor and there is no restrictions against anyone so qualifying himself.

We think it is now practically universally conceded by all authorities that wherever the proper prosecution of a calling or profession requires a certain amount of technical knowledge and
48 professional skill and the lack of them may result in material damage to the public, it is a legitimate exercise of police power to prohibit anyone from engaging in such calling or work who has not previously properly qualified therefor. "The right of the State to exercise this control over skilled trades and the learned professions with a single exception in respect to teachers and expounders of religion, has never been seriously questioned. Thus, we find in every State statutes which provide for the examination of those who wish to engage in the practice of the law, of medicine and surgery, of pharmacy, and of those who desire to ply the trade of plumbing. And sometimes we find statutes which require all engineers to be examined before they are permitted to take charge of an engine. So, also, in England, *it is once made necessary for one to serve an apprenticeship before he was permitted to pursue any one of the skilled trades.* That is not now the law in the United States, *but there would be no constitutional objection to such a statute, if it were enacted.*" (Italics ours.) 1. Tiedeman on State and Federal Control of Persons and Property, p. 242; 9 Ency. of U. S. Sup. Ct. Rep. pp. 520-522, and cases cited in the notes; see also 4 Ency. of U. S. Sup. Ct. Rep. p. 431, and cases there cited; Freund Police Power sec. 116 and notes; 9 Ency. of U. S. Sup. Ct. Rep. pp. 483 to 486, and cases cited in the notes.

It was peculiarly the province of the Legislature to require, instead of an examination to ascertain whether or not a person had

such knowledge as to authorize him to fill the position of conductor, an experience by actual work*ed* for a reasonable specified period which would qualify him therefor. There is nothing in this record to show that the skill, knowledge and training received by a brakeman for two years, would not fully qualify him to take charge of and operate a train as conductor. From common knowledge we take it that this length of time of active work in the duties of a brakeman would so qualify him. It is true that some brakemen might never be of sufficient aptness and mental and even moral qualifications as to ever fit him for a position as conductor, but that does not affect the law.

49 The motion for rehearing is overruled.

PRENDERGAST, *Judge*.

(Delivered May 1, 1912.)

Endorsed: No. 867. W. W. Smith, appellant v. The State of Texas, appellee. Appeal from Gregg County. Motion for rehearing overruled. Opinion by Prendergrast, Judge. Filed in Court of Criminal Appeals May 1, 1912, E. P. Smith, Clerk.

Petition for Writ of Error and Order Allowing the Writ.

W. W. SMITH, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

To the Honorable W. L. Davidson, Presiding Judge of the Court of Criminal Appeals of the State of Texas:

Comes W. W. Smith, by his attorneys, J. W. Terry, Gardiner Lathrop, A. B. Browne and A. H. Culwell, and complains that in the record and proceedings, as also in the rendition of a judgment in a suit between W. W. Smith and the State of Texas, in the Court of Criminal Appeals of the State of Texas, being the highest Court of law or equity in said State to which the said Plaintiff in Error could appeal and obtain a decision on the merits of the issues involved in said cause, and same being the Court which has the final custody of the record in said cause, and that final judgment having been rendered against the said Plaintiff in Error by the said Court of Criminal Appeals of the State of Texas on the 13th day of December, 1911, and in which plaintiff in error's motion for a rehearing was overruled by said Court on the 1st day of May, 1912; that in said cause there is drawn in question the validity of a statute of the State of Texas, the same being known as Chapter 46, General Laws of the State of Texas, passed by the 31st Legislature and being "An Act to provide adequate punishment for any person who shall engage or act in the capacity of a locomotive engineer or train conductor upon any railroad in the State of

50 Texas without having first served three years as a locomotive fireman or engineer, or if engaged as conductor on any railroad train in this State he shall be punished as therein provided if he engages to so act without first having served two years as a brakeman or conductor of a freight train. To punish any person who

shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of this act, but exempting lines operating *of* less than 25 miles in length from the operation of this act." And the Court of Criminal Appeals of the State of Texas having affirmed the judgment of the County Court of Gregg County, Texas, whereby and wherein there was imposed a fine and judgment was awarded against plaintiff in error for the sum of twenty-five dollars ($25.00) and costs, and which said judgment is now a final judgment, and from which there is no appeal to any other court or courts within the State of Texas; that Plaintiff in Error plead in the Court of Criminal Appeals of the State of Texas, as well as in the County Court of Gregg County, Texas that the said act of the legislature was unconstitutional and in contravention of Section 1 Fourteenth Amendment to the Constitution of the United States; that said act was class legislation and was an undue interference with the personal liberties of the Plaintiff in Error, as well as of the Texas and Gulf Railway Company, by which he was employed, and prevents them, and each of them, from exercising the constitutional right of making contracts, and that same was in violation of the Constitution of the United States in that it restricted railway companies from employing men well qualified to act in the capacities mentioned, and that said act was interference with interstate commerce, that it was class legislation because the act did not apply to all railway companies and that it provided special privileges to persons who had worked in the capacity of a brakeman or conductor on a freight train, which pleas, and each of them, as presented in said Court of Criminal Appeals and in the County Court of Gregg County, Texas, was by said courts, and each of them, overruled, and that said act of the legislature declared constitutional. And your petitioner here represents that said act of the legislature denies to him equal protection
51 of the laws, deprives him of his property without due process of law, and that same is in contravention of said Section 1, Fourteenth Amendment to the Constitution of the United States, and that such is class legislation, and that there is here drawn in question the validity of a statute of, or an authority exercised under said State of Texas on the ground of their being repugnant — the Constitution and laws of the United States and the decision was in favor of such, their validity, all of which appears in the record and proceedings of said suit. Manifest error hath happened, to the great damage of the said W. W. Smith;

Wherefore, the said W. W. Smith, by his attorneys, prays the allowance of writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

J. W. TERRY,
GARDINER LATHROP.
A. B. BROWNE.
A. H. CULWELL,
Attorneys for W. W. Smith.

Allowed by
(Signed) W. L. DAVIDSON,
Presiding Judge of the Court of
Criminal Appeals of the State of Texas.

Endorsed: No. 867. W. W. Smith, plaintiff in error v. The State of Texas, defendant in error. Petition for allowance of writ of error. Filed in Court of Criminal Appeals May 13, 1912. E. P. Smith, Clerk.

52 *Writ of Error Bond.*

W. W. SMITH, Plaintiff in Error,
v.
THE STATE OF TEXAS, Defendant in Error.

Know all men by these presents, that we, W. W. Smith, as principal, and Jno. Sealy and George Sealy, as sureties are held and firmly bound unto the State of Texas, in the full and just sum of One Thousand Dollars ($1,000.00) to be paid to the said State of Texas, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 11th day of May, in the Year of Our Lord, 1912;

Whereas, lately in the Court of Criminal Appeals of the State of Texas in a suit or prosecution pending in the said Court, wherein W. W. Smith was appellant and the State of Texas was appellee, a judgment was rendered against the said appellant, W. W. Smith and the said W. W. Smith having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit or prosecution, and the citation directed to the said State of Texas citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington Thirty (30) days from the date hereof, now the condition of the above obligation is such that — the said W. W. Smith shall prosecute his writ of error to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void, else to remain in full force and effect.

W. W. SMITH.
JNO. SEALY.
GEO. SEALY.

Approved by
(Signed) W. L. DAVIDSON,
Presiding Judge Court of Criminal Appeals of the State of Texas.

53 *Writ to Operate as a Supersedeas.*

I, Jno. Sealy, do solemnly swear that I am worth, in my own right, at least the sum of Five Thousand Dollars ($5,000.) after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which

are known to me; that I reside in Galveston County, State of Texas, and have proprty in said State liable to execution worth more than Five Thousand Dollars ($5,000.00).

(Signed) JNO. SEALY.

Sworn to and subscribed before me this, the 11th day of May, 1912.

[SEAL.] MARION DOUGLAS,
Notary Public in and for Galveston County, Texas.

I, Geo. Sealy, do solemnly swear that I am worth, in my own right, at least the sum of Five Thousand Dollars ($5,000.00) after deducting from my property that which is exempt by the Constitution and laws of the State from forced sale, and after the payment of all my debts of every description, whether individual or security debts, and after satisfying all encumbrances on my property which are known to me; that I reside in Galveston County, State of Texas, and have property in said State liable to execution worth more than Five Thousand Dollars ($5,000.00).

(Signed) GEO. SEALY.

Sworn to and subscribed before me this, the 11th day of May, 1912.

[SEAL.] MARION DOUGLAS,
Notary Public in and for Galveston County, Texas.

(Endorsed: No. 867. W. W. Smith, plaintiff in error, v. The State of Texas, defendant in error. Writ of Error Bond. Filed in Court of Criminal Appeals May 13, 1912. E. P. Smith, Clerk.

54 *Assignments of Error.*

W. W. SMITH, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Comes now, W. W. Smith, plaintiff in error, by his attorneys, J. W. Terry, Gardiner Lathrop, A. B. Browne and A. H. Culwell, and says that in the records and proceedings aforesaid there is manifest error in the judgment and decision of the Court of Criminal Appeals of the State of Texas, to-wit:

First.

That the Court of Criminal Appeals of the State of Texas erred in holding that Chapter 46 of the laws of the 31st Legislature and being "An Act to provide adequate punishment for any person who shall engage or act in the capacity of a locomotive engineer or train conductor upon any railroad in the State of Texas without having first served three years as a locomotive fireman or engineer, or if

engaged as conductor on any railroad train in this State he shall be punished as therein provided if he engages to so act without first having served two years as a brakeman or conductor of a freight train. To punish any person who shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of this act, but exempting lines operating *of* less than 25 miles in length from the operation of this act," was constitutional, and that the same was not in contravention of Section I, Fourteenth Amendment to the Constitution of the United States, and did not deny to the defendant equal protection of the laws, and did not deprive the defendant of his property without due process of law.

Second.

The Court of Criminal Appeals of the State of Texas erred in holding that the said act of the Legislature, same being Chapter 46 of the laws of the 31st Legislature, as hereinbefore described, was not class legislation and that it was not necessary for said act to apply to all railway companies within the State of Texas, but that those of a given length would be exempted therefrom.

Third.

The said Court of Criminal Appeals erred in holding that the said act of the Legislature as hereinbefore described was not, under the facts of this case, an interference with interstate commerce, and therefore void.

Fourth.

The said Court of Criminal Appeals of the State of Texas erred in sustaining said act, and in holding that same was not an unauthorized interference with the right of contract as guaranteed by the Constitution and laws of the United States.

Fifth.

The said Court of Criminal Appeals erred in holding that it was competent for the Legislature to pass an act forbidding men from following lawful avocations for which they were well qualified, unless such men had had a given experience in some other avocation, or had filled some other position.

Sixth.

Said Court of Criminal Appeals of the State of Texas erred in holding that said act was a proper exercise of the police power of the State, and in failing and refusing to hold that the same was an arbitrary and uncalled for exercise of the police power of the State.

Respectfully submitted,

J. W. TERRY,
GARDINER LATHROP,
A. B. BROWNE,
A. H. CULWELL,
Attorneys for Plaintiff in Error. W. W. Smith.

(Endorsed:) 867. W. W. Smith, plaintiff in error, vs. The State of Texas, defendant in error. Assignments of Error. Filed in Court of Criminal Appeals, May 14, 1912. E. P. Smith, Clerk.

56 *Certificate.*

THE STATE OF TEXAS:

I, E. P. Smith, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, do hereby certify that the foregoing fifty-five pages contain a true and correct copy of the proceedings had in the Court of Criminal Appeals of the State of Texas in cause No. 867, W. W. Smith, appellant, vs. The State of Texas, appellee, from Gregg County, as the same now appears of record and on file in my office.

In Witness Whereof, I hereunto set my hand and affix the seal of said Court this the 23d day of May, A. D. 1912.

[Seal Court of Criminal Appeals of Texas.]

E. P. SMITH,
Clerk of the Court of Criminal Appeals
of the State of Texas.

57 W. W. SMITH, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

President of the United States to the Honorable the Court of Criminal Appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Criminal Appeals of the State of Texas before you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between W. W. Smith, Appellant, and the State of Texas, Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity, or wherein was drawn in question the construction of the clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right or privilege especially set up or claimed under such clause of the said Constitution, treaty, statute or commission, and manifest error hath happened, to the great damage of

the said Appellant, W. W. Smith, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to
58 the Supreme Court of the United States, together with this writ, so that you have the same at Washington within Thirty (30) days from the date hereof in the said Supreme Court, to be then and there held that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, with all right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of May, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

D. H. HART,
Clerk of the District Court of the United States in and for the Western District of Texas for the Fifth Circuit,
By A. B. COFFEE,
Deputy Clerk.

Allowed by
W. L. DAVIDSON,
Presiding Judge of the said Court of Criminal Appeals of the State of Texas at Austin, Texas.

It is hereby certified that a copy of this writ is this day lodged in the Clerk's Office for the use of the defendant in error, this the 13th day of May, A. D. 1912.

[Seal Court of Criminal Appeals of Texas.]

E. P. SMITH,
Clerk Court Criminal Appeals of Texas.

58½ [Endorsed:] No. 867. W. W. Smith, plaintiff in error, vs. The State of Texas, defendant in error. Writ of Error. Filed in Court of Criminal Appeals May 13, 1912. E. P. Smith, clerk; by J. B. Cave, deputy.

59 W. W. SMITH, Plaintiff in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

United States of America to the State of Texas, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States to be holden at Washington within Thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Court of Criminal Appeals of the State of Texas at Austin, Texas, wherein W. W. Smith is Plaintiff

in Error and you are Defendant in Error, said cause being numbered 867 on the docket of the said Court of Criminal Appeals of the State of Texas, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. L. Davidson, Presiding Justice of the Court of Criminal Appeals of Texas at Austin, Texas, this 11th day of May, 1912.

W. L. DAVIDSON,
Presiding Judge of the Court of Criminal

Attest:
E. P. SMITH,
Clerk of the Court of Criminal
Appeals of the State of Texas.

[Seal Court of Criminal Appeals of Texas.]

MAY 16TH, 1912.

Service accepted, notice waived.

J. P. LIGHTFOOT,
Attorney-General.

60 [Endorsed:] No. 867. W. W. Smith, plaintiff in error, vs. The State of Texas, defendant in error. Citation in Error. Filed in Court of Criminal Appeals May 13, 1912. E. P. Smith, clerk; by J. B. Cave, deputy.

Endorsed on cover: File No. 23,235. Texas Court of Criminal Appeals. Term No. 667. W. W. Smith, plaintiff in error, vs. The State of Texas. Filed May 31st, 1912. File No. 23,235.

Supreme Court of the United States

[illegible]

No. [illegible]

[illegible],
Plaintiff in Error,
vs.
THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

[illegible],
[illegible],
Attorneys for Plaintiff in Error.

[illegible],
Of Counsel.

[illegible]

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AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

No. 268

W. W. SMITH,
Plaintiff in Error,
vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was a prosecution originating in an information filed by the County Attorney of Gregg County, Texas, against plaintiff in error wherein it was charged that he had acted as a conductor on a freight train on the railroad of the Texas & Gulf Railway Company in the State of Texas without having for two years prior thereto served or worked

in the capacity of a brakeman or conductor on a freight train contrary to the statute in such cases made and provided (Rec., 1, 2), being Section 2 of Chapter 46, General Laws of Texas passed at the 31st Legislature, 1909. The statute is copied in full in the Appendix hereto, Section 2 thereof reading as follows:

> "If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense."

Defendant moved to quash the information upon the ground, among others, that the statute in question was violative of the Fourteenth Amendment to the Federal Constitution in that it prevented one who was well qualified from earning a livelihood and from voluntarily engaging in an avocation for which he was adapted, and that the same was an unreasonable, unwarranted and unnecessary interference with the rights of persons to make contracts for employment, and in that it was class legislation and was an unreasonable and unnecessary exercise of the so-called police power of the State in that it deprived defendant below, plaintiff in error, of liberty without due process of law and denied to him the equal protection of the laws of the State; also upon the ground that it was an unlawful regulation of interstate commerce and violative of the Commerce Clause of the Constitution.

The motion to quash was overruled and on the trial in the County Court of Gregg County defendant was found guilty and a fine of $25.00 was imposed. (Rec., 5.) Motion for a new trial, presenting in general and special form the same questions which had been rejected in the motion to quash the information, was also overruled. (Rec., 20.) Defendant thereupon prosecuted an appeal to the Court of Criminal Appeals of the State of Texas, which is and was the court of last resort in such cases. That court affirmed the judgment of the County Court thereby denying to plaintiff in error the Federal right insisted upon. After the motion for a rehearing had been overruled the writ of error herein was allowed.

The facts pertaining to the case at issue are undisputed (See statement of facts, pp. 6 to 11, inclusive) and are fairly well stated in the opinion of the Court of Criminal Appeals. (Rec., 23-26, incl.)

It appears that on a given date defendant below acted as the conductor on a freight train of the Texas & Gulf Railway Company without having for two years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad in the State of Texas and that he was not acting as such conductor on said train in case of the disability of the conductor while out on the road between division terminals, nor in case of an emergency where the said Railway Company could not obtain a person to act as conductor who had for two years prior thereto served in the capacity of a brakeman or conductor on a freight

train within the exceptions provided in Section 4 of the statute. It also appeared that the line of the Texas & Gulf Railway Company at that time was more than 25 miles in length; that he had been working in the capacity of a locomotive engineer for said railway company for a number of years; that he had been a fireman pulling freight, mixed and passenger trains; that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman, and that acting as an engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than would acting as a brakeman; that under the rules of all railroads the engineer is held equally responsible with the conductor for the safe operation of all the trains; the orders are given to the engineer as well as to the conductor, each order being in duplicate, one given to the conductor and the other to the engineer; that if anything should happen to disable the conductor or prevent him from proceeding with his train the engineer is required to take charge thereof and handle it into the terminal; that the engineer is constantly with the train and knows all the signals, how the couplings are made, cars switched and distributed, how they are taken into the train and transferred from one place to another and is so constantly associated with all the work of the conductor that he should know as much about how the freight trains should be operated by a conductor as the conductor himself; that all the acts of the conductor pertaining to the safe operation of the train are carried on in his presence and within his observation; that the matter of han-

dling way-bills and ascertaining the destination of the cars is easy and that it does not take a person that has had experience as a conductor to understand that part of the service; that the way-bills are plainly written and the destinations are plainly given and the booking of the way-bills and delivering them with the cars is clerical and can be done by anyone who can read and write and who has ordinary sense; that every act that is done by the conductor towards the safe handling of the train also has to be done by the engineer and all of the conductor's acts with reference to this are in the view and observation of the engineer. The experience of this engineer and the character of service he had had with railroads was also set out in the opinion of the Court of Criminal Appeals, from which it appears that he was thoroughly familiar with all the rules and regulations that pertain to the service of a conductor on a freight train. It further appeared that the train on which he acted as a conductor contained a number of cars of freight originating in Texas and destined to various places in Kansas, Oklahoma and Missouri; that the train in question was operated by him with safety and that he knew how to perform all the details of the work as the conductor thereof.

The opinion of the Court of Criminal Appeals disposing of the motion for rehearing is found between pages 35 and 37, printed record.

SPECIFICATION OF ERRORS.

1. The Court of Criminal Appeals of the State of Texas erred in holding that Chapter 46 of the laws of the 31st Legislature of Texas, being "An Act to provide adequate punishment for any person who shall engage or act in the capacity of a locomotive engineer, or train conductor, upon any railroad in the State of Texas, without having first served three (3) years as a locomotive fireman, or engineer, or if engaged as conductor on any railroad train in this State, he shall be punished as therein provided if he engages to so act without first having served two (2) years as a brakeman, or conductor of a freight train. To punish any person who shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of this Act, but exempting lines operating of less than 25 miles in length from the operation of this Act," was constitutional, and that the same was not in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and did not deny to the defendant the equal protection of the laws, and did not deprive the defendant of his liberty and property without due process of law.

2. Said court erred in holding that said statute was not an unauthorized interference with the right of contract as guaranteed by the Constitution and laws of the United States.

3. Said court erred in holding that said statute was a proper exercise of the police power of the State, and in failing and refusing to hold that the

same was an arbitrary and uncalled for exercise of such supposed power.

4. Said court erred in holding that said statute was not under the facts of this case an unlawful or unreasonable interference with interstate commerce and, therefore, void.

ARGUMENT.

I.

THE STATUTE, BY UNREASONABLY AND ARBITRARILY RESTRICTING THE RIGHT TO ENGAGE IN A LAWFUL OCCUPATION TO A FAVORED CLASS THEREBY DEPRIVING OTHERS WHO ARE AS WELL FITTED TO ENGAGE THEREIN AND DEPRIVING THEM OF ALL OPPORTUNITY TO SHOW THEIR FITNESS, IS ARBITRARY AND CAPRICIOUS UPON ITS FACE AND IS OBVIOUSLY NOT PASSED FOR THE SOLE PURPOSE OF PROTECTING THE COMMUNITY AGAINST THE RESULTS OF INEXPERIENCE, BUT TENDS TO GIVE A MONOPOLY IN A PARTICULAR EMPLOYMENT TO A FAVORED CLASS. IT DEPRIVES THOSE WHO DO NOT FALL WITHIN THE FAVORED CLASS OF THEIR LIBERTY OR FREEDOM WITHOUT DUE PROCESS OF LAW AND DENIES TO THEM THE EQUAL PROTECTION OF THE LAWS OF THE STATE.

Here we have a case in which a citizen of the United States well fitted by experience and knowledge, as shown by the undisputed evidence, to engage in the lawful occupation of a freight train conductor, is denied that right and the freedom of following a lawful pursuit by a statute of the state so narrow and restrictive in the qualification prescribed as to exclude him under the construction of the State Court, and which provided no method of testing his capacity or fitness, but denied him any opportunity of showing the same before some board or expert tribunal.

It must strike every fair minded man that there is something radically wrong in a statute which would

compel a criminal conviction thereunder under the admitted facts in this case.

The statute, as construed by the State Court, made it unlawful for the defendant to engage in the lawful occupation of a freight train conductor simply because for two years *prior* thereto he had not served or worked in the capacity of a brakeman, or conductor, on a freight train. No method was provided by which he could be accorded a hearing before an impartial expert board or tribunal as to his fitness; no tests of fitness were prescribed, but simply the bald enactment was made that no one except those who had served or worked in the capacity of brakemen or conductors on freight trains should be eligible to act as a railroad conductor. So this lawful occupation was to be monopolized, under the statute, by those alone who had worked for two years in the other line, namely, that of freight brakeman or conductor.

The Texas Act provides no *tests* for determining the fitness of one to act as a conductor on a railroad train and no tribunal is created to pass upon or determine his fitness. It prohibits every person under penalty to operate a locomotive engine without having served three years *prior thereto* as a fireman or engineer on a locomotive engine, and it prohibits every person to act as a conductor on a railroad train without having for two years *prior thereto* served in the capacity of a brakeman or a conductor on a freight train. It is then provided in Section 3 that any person who shall knowingly engage or "*promote*" any person to do any act in violation of the

above provisions shall be deemed guilty of a misdemeanor, etc.

In terms and upon its face this statute attempts to regulate and restrict *promotion* in the train service. It does not attempt to prescribe reasonable tests and qualifications which may be met by those who are professedly fit and, therefore, it cannot be regarded as having been passed solely for the protection against harm either of the individual himself or of the public at large.

The question, therefore, is whether or not a State may pass a law affecting a useful occupation which denies to one who is admittedly well fitted to perform its duties unless such person has worked in another and different line of employment for a given period and which statute provides no method by which such individual may be heard upon the question of his fitness and right.

As stated before, under the provisions of this Act, the exclusive qualification of any man's fitness to act as a conductor on a passenger train in Texas is that he must have had two years' experience as a conductor or a brakeman on a freight train. The only qualification possible before he may act as a conductor on a freight train is that he must have served two years as a brakeman on a freight train. A man may have worked on a railroad in Georgia for twenty years as a passenger conductor, there may be no question as to his qualification or fitness, as to his care or skill, and yet no railroad in Texas could employ him to act in that capacity unless he could show two years service as a conductor or brakeman in the freight service.

The undisputed evidence in this case discloses the defendant to have been a locomotive engineer for a number of years; that he thoroughly understood the duties of a conductor in the freight service; that the same knowledge was required of him as an engineer as would be required if he were a conductor and, in truth, the State, in this case, tacitly admits that the defendant was qualified to act as a conductor, but simply undertakes to deny to him the right to so act, or for the railroad to employ him to so act, for the sole reason that he had never been a freight brakeman; nor is there anything in the evidence to indicate that to have worked as required by the statute would fit or qualify a person to act in the capacity this defendant was acting at the time of his arrest. The State seems to act upon the theory, and such appears to be the basis of the opinion of the Court of Criminal Appeals, that the Legislature is and was the sole judge as to what the citizen may do and that when one of its acts is attacked it is immaterial for the defendant to show a usurpation of power, or the unreasonableness of its restriction upon the exercise of a constitutional right.

The Fourteenth Amendment, like similar provisions found in many of the state constitutions, but going somewhat farther, was intended to guarantee to every person within the limits of a state not only protection of property rights against deprivation except by due process of law, but also that measure of liberty and freedom inherent in and enjoyable by people in a free republic of engaging in lawful occupations, and that of this right, frequently designated as "inalienable," the individual cannot be deprived

by any arbitrary action of the State nor without due process of law. Indeed, it is of the highest interest to the State that this freedom in the choice of an occupation should be protected because wherever one is denied that right and forced to follow some other occupation to which he may not be as well adapted a handicap to his usefulness is put upon him, and a member of the State is forced to become inefficient. It is a serious thing indeed to deprive any one willing to work of the right to earn a living in a lawful occupation.

In order to afford federal protection to these so-called inalienable rights of life, liberty, the enjoyment of property and the pursuit of happiness, which, while recognized in many state constitutions, were not always enforced without discrimination, the Fourteenth Amendment was adopted. But that amendment contained the other provision intended to obviate unjust discriminations in the enjoyment of these rights by a guarantee of the equal protection of the laws of the State, or as is well stated by this court in *Yick Wo* v. *Hopkins*, 118 U. S., 369:

> "The equal protection of the laws is a pledge of the protection of equal laws."

But little improvement can be made upon the summing up of Mr. Justice Field in *Barbier* v. *Connolly*, 113 U. S., 31, upon the scope of this amendment as follows:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary

deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

On page 32 he continued:

"Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The above language has been frequently quoted with approval and applied in other cases.

Yick Wo v. *Hopkins*, 118 U. S., 367.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 559.

Mr. Justice Matthews used the following eloquent language in *Yick Wo* v. *Hopkins*, 118 U. S., 370:

"But the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monu-

ments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws."

Is this an expression of a realization or a mere hope?

However, notwithstanding such broad constitutional guarantee it is of course admitted that this liberty or freedom and enjoyment of property in any organized state or community is subject to the rights of others and ought not and may not be exercised in such way or manner as to jeopardize or endanger the safety or welfare of others in the community and that to protect the community in general against harm likely to arise from an exercise of such rights in a careless or improper manner, the Legislature or State still has the implied power of protecting the rest of the people by reasonable regulations obviously intended and calculated to accomplish that end.

But it must be obvious at a glance that the question whether the legislation or regulation restricting the exercise of these rights has been passed and is reasonably intended to accomplish the purpose of protecting the rest of the community necessarily involves a judicial question as to its validity and constitutionality, and it is, therefore, for the court to determine whether the statute upon its face and as being applied in a given case is reasonably necessary for the protection of the balance of the community and does not unreasonably or unnecessarily interfere with the rights guaranteed by the Constitution,—for the Constitution is the supreme law of the land.

No doubt, for the purpose of making general regu-

lations of a police nature, the Legislature may classify trades and occupations so as to make the regulations applicable thereto apply to all engaged in a particular trade or occupation or falling within a particular class to be regulated. But as held by this court such classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

See

Connolly v. *Union Sewer Pipe Co.*, 184 U. S., 560, 561.

With reference to the guarantees of the Fourteenth Amendment, as affected by the implied police power of the State, this court said in *Lochner* v. *New York*, 198 U. S., 53:

"The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. *Allgeyer* v. *Louisiana*, 165 U. S., 578. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere."

On page 56 the court continued:

"In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor."

On pages 57 and 58 it was further stated:

> "It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor."

On page 61 it was further stated:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78. The court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U. S., 356."

Much of the foregoing language from the Lochner case was quoted with approval and applied by this court in *Adair* v. *United States*, 208 U. S., 173, 174.

Quite likely the State Legislature in regulating the exercise of dangerous occupations may prescribe general tests and qualifications for those engaging therein which are reasonably calculated to insure fitness and to protect others against danger arising from inexperience or lack of knowledge. But the Act in such case must be broad enough to insure to all the liberty and freedom of engaging in any lawful occupation consistent with the public safety. No doubt the Legislature might prescribe, in general terms, that certain classes who had followed a given occupation for a number of years and had presumably acquired requisite experience or knowledge might continue therein, and also prescribe that all others undertaking the same employment should be required to pass certain reasonable tests and the examination of some expert board or tribunal as to their fitness. Under such legislation it will be readily seen that each individual is given an opportunity to be heard and to show his fitness and is not deprived of his liberty without due process of law. It is not necessary that such tribunal be a judicial one because a hearing before an impartial board of expert examiners would be better calculated to accomplish the ends sought and at the same time protect the individual in his rights. Nevertheless if such board should act arbitrarily and capriciously and without just cause deprive a party of the right to engage in a lawful occupation for which he was fitted and qualified, the courts would no doubt afford him the necessary protection. See:

Dent v. *West Virginia*, 129 U. S., 114, 124, 125.

Yick Wo v. *Hopkins*, 118 U. S., 356, 369.

Reetz v. *Michigan*, 188 U. S., 508, 509.

In Cooley's Constitutional Limitations, 7th Ed., pp. 889, 890, it is said:

> "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them. But here, as elsewhere, it is proper to recognize distinctions that exist in the nature of things, and under some circumstances to inhibit employments to some one class while leaving them open to others. Some employments, for example, may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them would be open to no reasonable objection. The same is true of young children, whose employment in mines and manufactories is commonly, and ought always to be regulated. And some employments in which integrity is of vital importance it may be proper to treat as privileges merely, and to refuse the license to follow them to any who are not reputable."

In foot note 2 to the last page, he states:

> "The right to practice cannot be refused without giving the applicant an opportunity to be heard. *State* v. *State Med. Ex. Board*, 32 Minn., 324, 20 N. W., 238; *Gage* v. *Censors*, 63 N. H., 92."

Indeed, one can no more be deprived of his liberty or freedom than of his property without due process of law. Rights under the former are as much vested as the right to the enjoyment of property lawfully acquired. No doubt the exercise of such rights may

be regulated or restricted within reasonable bounds for the protection of the public, but no one can be deprived of them without being accorded an opportunity to be heard upon such question.

Mr. Webster, in his famous argument in the Dartmouth College Case, used the following language, frequently quoted by this court:

> "By the 'law of the land' is most clearly intended *the general law*, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that *every citizen should hold his life, liberty and property and immunities under the protection of the general rules which govern society.* Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land."

Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat., on page 244, said:

> "As to the words from Magna Charta incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In No. 51 of the Federalist, generally attributed to Mr. Madison, it was stated:

> "*It is of great importance in a republic not only to guard the society against the oppression of the rulers, but to guard one part of the society against the injustice of the other part.* * * * In a free government the security for civil rights must be the same as that for religious rights. * * * *Justice is the end of government; it is*

> *the end of civil society.* It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. *In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger.*"

No doubt the courts, largely as a matter of courtesy, will defer somewhat to the views of the Legislature if it appears that the tests prescribed may have a reasonable foundation and that the exclusion may be reasonably justified. But it is of the greatest importance that the courts should not permit the constitutional guarantee of protection of these natural rights to be subordinated altogether to the supposed judgment of a state legislature acting only in pursuance of an impliedly reserved power in the State to pass wholesome measures and regulations of occupations, but which measures must apparently and in fact be intended for the protection of the community against dangers arising from the performance of duties by one lacking in the necessary care or skill. As was stated by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch., 176:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation."

That the refusal of the State to permit one to en-

gage in a lawful business will be held invalid, unless there is some good reason for the refusal, is well illustrated in the case of *Wyeth* v. *Thomas et al.*, 200 Mass., 474; s. c. 86 N. E., 925, wherein a rule adopted by the board of registration in embalming, under a Massachusetts statute, and providing that no permits for burial should be issued to any person who was not a registered embalmer, was held to be unconstitutional.

In *Josma* v. *Western Steel Car Co.*, 249 Illinois, 508, a statute ostensibly passed to prohibit deception and misrepresentation in employing workmen was held not sustainable as a police measure where the class was arbitrarily limited to those changing from one place to another, and the deception, as failure to notify of a strike, arbitrarily limited to conditions as important to professional and semi-professional people in the employ of others as to workmen.

In a well considered opinion of the Supreme Court of Wisconsin in *Bonnett* v. *Vallier*, 136 Wis., 193; 116 N. W., 885, there was held as invalid and not a proper exercise of police power, a statute regulation making every habitation regardless of locality a boarding or lodging house in case the proprietor allowed a person not a member of his family to have a sleeping room, and which regulated its maintenance as regards light, location of beds, water closets, etc.

In a recent decision of the Supreme Court of Colorado in *Chenoweth* v. *State Board of Medical Examiners*, ... Colo., ..., 135 Pac., 771, that court held

as unconstitutional a statute of that State authorizing the State Board of Medical Examiners, when any practitioner caused the publication of any advertisement relative to any disease of the sexual organs, to revoke his license, because the statute in question would authorize the revocation of a license for conduct which would not necessarily be immoral or injurious to the public.

See, also:

Ruhstrat v. *The People*, 185 Ill., 133, 141, 142.

Also in *The People* v. *Schenck*, 257 Ill., 384, a statute prohibiting the use of emery wheels or emery belts in any basement or room lying wholly or partly beneath the ground, was held unconstitutional, as making an arbitrary discrimination against such rooms without regard to the question of ventilation or other sanitary conditions.

See, also, *In re Opinion of the Justices*, 211 Mass., 618, 98 N. E., 337, wherein a statute was held unconstitutional which exempted associations of employers or trade unions, their members and officials, from actions of tort committed by or on behalf of such association or union.

See also:

Morgan v. *State*, ... Ind., ..., 101 N. E., 7, paragraph 3 of syllabus.

In *State* v. *Wagener*, 69 Minn., 206; 72 N. W., 67, a statute purporting to license and regulate hawkers and peddlers throughout the state, providing that it should not be construed to prevent any manufac-

turer, mechanic, nurseryman, farmer and butcher, selling, as the case may be, his manufactured articles, or the products of his nursery or farm, or his wares, etc., as butcher, either by himself or employe, was held invalid because the attempted classification or restriction was founded on no proper or natural distinction, but was merely arbitrary.

Somewhat similar was the ruling in case of *Commonwealth* v. *Snyder*, 182 Pa. St., 630, 38 Atl., 356.

In *State* v. *Kreutzberg*, 114 Wis., 530; 90 N. W., 1098, a State statute providing that no person or corporation should discharge an employe because he was a member of any labor organization was held unconstitutional. In the elaborate opinion in that case a great number of authorities are cited and commented upon.

In this connection may also be noted the opinion of Judge O'Brien in *People* v. *Hawkins*, 157 New York, pages 7 to 11, inclusive, wherein he holds that a New York statute requiring convict made goods to be so labeled before being sold or exposed for sale, was repugnant to the due process clause of the State Constitution inasmuch as it unnecessarily tended to depreciate or deteriorate the value of the goods without any just reason which could be suggested for the protection of the public at large.

In *Mayor of the City of Vicksburg* v. *Mullane*, ... Miss., ...; 63 Southern, 412, a regulation requiring every applicant for a license as a plumber to pass an examination as to his skill in plumbing and satisfy a board "that the applicant, or at least one resident member of the firm, or one resident execu-

tive officer in the corporation making the application, is a master plumber, * * * who will give his personal attention to the work, also that the applicant will employ only competent help, and is financially responsible," was held invalid as unlawfully discriminating against individuals in favor of firms or corporations by permitting persons employed by the latter to do plumbing without examination, provided one member of the firm was a licensed plumber, while requiring all individual plumbers to be qualified licensed plumbers. The court reviewed a number of authorities and held that the regulation imposed special restrictions and burdens on some while granting special privileges to others engaged in the same work.

The ruling of this court, made shortly after the adoption of the Amendment, in the leading case known as the "Slaughter House Cases," 16 Wall., 36, and which was decided by an almost evenly divided court, supports, if anything, our views. There the Louisiana Legislature granted to a corporation for a limited period the exclusive right to maintain slaughter houses and landings for cattle in a district embracing New Orleans and prohibited others from keeping slaughter houses or landings for cattle within those limits and required all cattle and other animals intended for sale or slaughter in the district to be brought to the yards and slaughter houses of the corporation, and authorized the corporation to exact prescribed fees for the use of its facilities. It was held that this grant, guarded by proper limitations of prices to be charged, and imposing the duty of providing ample conveniences,

with permission to all owners of stock to land, and of all butchers to slaughter at these places, was a proper police regulation for the health and comfort of the people. It will be seen that the statute in question fixed the place at which a business likely to become a nuisance should be carried on, but did not prevent anyone from engaging in such business. On page 61 it is said:

> "It is not, and cannot be successfully controverted, that it is both the right and the duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else.*
>
> The statute under consideration defines these localities and forbids slaughtering in any other. It does not, as has been asserted, prevent the butcher from doing his own slaughtering. On the contrary, the Slaughter House Company is required, under a heavy penalty, to permit any person who wishes to do so, to slaughter in their houses; and they are bound to make ample provision for the convenience of all the slaughtering for the entire city. The butcher then is still permitted to slaughter, to prepare, and to sell his own meats; but he is required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations furnished him at that place."

As illustrative of what this court has condemned as an arbitrary classification we refer to *G. C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150; *Connolly* v. *U. S. P. Co.*, 184 U. S., 549; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S., 79. See also recent decision of the New Jersey Supreme Court in *Smith* v. *Board*

of Examiners, &c., 88 Atl., 963. Also *Little* v. *Tanner,* 208 Fed., 605, 609, 610, 611.

On the proposition that an enactment cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact, we refer to *Eden* v. *People,* 161 Ill., 296; *People* v. *Marx,* 99 New York, 377, and *Ritchie* v. *People,* 155 Ill., 98.

As to statutes prescribing certain tests or qualifications to be possessed by those engaging in certain occupations they have been sustained only where it was obvious that they were passed in the interest of public safety or health and the tests prescribed were general in character and reasonably tended directly to accomplish the object sought. An opportunity was usually accorded for a hearing and parties were not excluded who were able to show their fitness.

In *Smith* v. *Alabama,* 124 U. S., 465, the statute made it unlawful for an engineer on a railroad train to act without first undergoing an examination and obtaining a license. It was made his duty to apply to the board of examiners and be examined in practical mechanics concerning his knowledge of operating a locomotive engine and his competency as an engineer, and if found competent a license was issued, unless it was found that he was reckless or intemperate. The act was challenged on the sole ground of being a regulation of interstate commerce. This contention was overruled, but Mr. Justice Matthews used the following language:

> "No objection to the statute, as an impediment to the free transaction of commerce among the States, can be found in any of its special

provisions. It requires that every locomotive engineer shall have a license, *but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant.*"

In *N. C. & St. L. Ry.* v. *Alabama*, 128 U. S., 96, the Act required those desiring to be locomotive engineers, or to fill certain other positions in the railway service, to have their eyes tested as to color blindness, and established a board to conduct the same. The statute was sustained because it did not prescribe the field or limit the number of those who might seek this chararcter of employment. Under its provisions any man was free to apply to the board and stand the examination and, if he qualified thereunder, to accept employment in that service. Under the Texas Act it makes no difference how well qualified a man may be to act as a conductor on a railway train he is denied the privilege of following that calling unless he has worked two years as a conductor or brakeman on a freight train.

In the above cases it was simply held that it was competent for the State to require an applicant who desired to become a locomotive engineer to satisfy an expert board of examiners in reference to his knowledge of practical mechanics and skill in operating a locomotive, and habits as to sobriety and, as he has been afforded a hearing and the tests are reasonable, we see no objection. But if reasonable tests are satisfied, and it appears there is no question as to competency, we deny the right of a State to go further and say that he shall not pursue that occupation because he has not followed another. Such a narrow and arbitrary limitation upon his right

simply allows to the favored few a special privilege.

In *Williams* v. *Arkansas*, 217 U. S., 79, the statute which was sustained prohibited, drumming on trains for business for hotels, bath houses, physicians, etc. It was sustained as tending to prevent annoyances to travelers from other States to the Hot Springs from importunities of drummers. But it will be seen that the Act applied to everybody alike.

In *Watson* v. *Maryland*, 218 U. S., 173, a medical registration law was sustained as not denying equal protection of the law because its provisions did not apply to those who had practiced prior to a specified date and treated a certain number of persons within a year prior thereto, or because it did not apply to gratuitous services, or physicians of hospitals, none of the exceptions being unreasonable. It was not contended that the tests and requirements for registration were unreasonable in that case, but simply because certain old practitioners and others presumably well qualified were excepted from the necessity of applying for a license, it was asserted the statute denied defendant the equal protection of the laws.

The lower court seems to have based its views largely upon a quotation from 1 Tiedeman on State and Federal Control of Persons and Property, p. 242, as follows:

> "So, also, in England, it was once made necessary for one to serve an apprenticeship before he was permitted to pursue any one of the skilled trades. That is not now the law in the United States, but there would be no constitu-

tional objection to such a statute, if it were enacted."

The same author, however, states in Volume 2, pp. 987, 988:

> "Every one, whether a corporation or a natural person, must so enjoy and make use of his rights as not to injure another; and the state may institute whatever reasonable regulations may be necessary to prevent injury to the public or private persons. Here, as elsewhere, however, the exercise of police power must be confined to those regulations which may be needed, and which do actually tend, to prevent the infliction of injury upon others. And it is a judicial question whether a particular regulation is a reasonable exercise of police power. The public necessity of the exercise of the police power in any case is a matter addressed to the discretion of the legislature; but whether a given regulation is a reasonable restriction upon personal rights is a judicial question."

It is, however, a poor argument to determine the validity of state legislation, which is limited and restricted by the Constitution, by referring to legislation enacted at an early day by the omnipotent English Parliament. It was the fashion at an early day in England to fix the pay for laborers and to compel all laborers when called upon to work for that pay. Would that be an argument or precedent to support similar legislation in this country?

Tiedeman no doubt had in mind the statute of Elizabeth of 1562, which enacted that no person should exercise "any trade or mystery" without having served a seven year apprenticeship. That statute, however, was never regarded with favor by the English courts and was always strictly construed

as not embracing or applying to any trade not in existence at the date of its passage. It was looked upon as tending to create monopolies and as restrictive of personal freedom or liberty. Owing to the views advanced by Adam Smith in "An Inquiry Into the Wealth of Nations," which was published in 1776, and in which he maintained that all monopolies or restraints on freedom of trade were injurious to the public interest, the statute was finally repealed in 1814. The effect of the repeal gave to every person the fullest right to exercise any occupation or calling of a mechanical or trading kind for which he deemed himself qualified.

See:

Encyclopedia Britannica, 11th Ed., Vol. 2, p. 228, "Apprenticeship."

Rex v. *Paris Slaughter*, 1 Lord Raymond, 513, 514.

See, also:

2 Kent's Commentaries, 12th Ed., star page 271, and Note c.

Again, by the Statute of 21st James I, c. 3, concerning Monopolies, it was declared in consonance with the principles of the common law, (see The Case of Monopolies, 11 Coke's Rep., 84b), that all mopolies and all licenses, charters, grants, letters patent, etc., "to any persons or bodies politic, for the *sole* buying, selling, making, working, or using anything within the realm," were unlawful and void, with the exception of patents for twenty-one years for inventions, etc., and of vested corporate rights relative to trade.

See Note (c) *supra*, 2 Kent's Commentaries, p. 272, in which it is also stated:

> "This statute, says Mr. Hume, contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law."

The constitutional amendment places this principle beyond unreasonable interference by statute or state legislative power as much as beyond that of any other department exercising power of or acting for the state.

> *C., B. & Q. Rld. Co.* v. *Chicago*, 166 U. S., 226.

It is obvious that the framers of the Fifth Amendment to the Federal Constitution as well as those who framed like provisions in the state constitutions, and finally the Fourteenth Amendment, were more imbued with the views of Adam Smith, as well as those of the common law courts of England and the declaration in the statute concerning Monopolies, than they were with the statute of Elizabeth on the subject of apprentices which had been pretty well discredited by the courts before the formation even of the Federal Constitution. The only monopoly permissible under the Federal Constitution is that found in the provision empowering Congress "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The framers of the American Constitutions were more impressed with the ideas and views of John Locke than of Thomas Hobbes. In his "Two Trea-

tises of Civil Government," Book 2, Chapters 9 and 11, Locke forcibly presents the view that persons enter society or into the social state for the purpose of better protecting their natural rights of liberty and property which each one alone could not adequately protect in a state of nature and that, therefore, as it cannot be supposed they intended to change their conditions to be worse the legislative power constituted by them can never be supposed to extend farther than the common good, but is obliged to secure every one's property by providing against the defects that made the state of nature so unsafe and uneasy, that is to say, these natural rights cannot be restricted beyond what is necessary to protect others in the community against harm. Hobbes, arguing from the same theory, came to an entirely different conclusion. While the theory of the social contract may be without historical foundation yet, like many other fictions, it has been utilized to deduce rights and obligations recognized as just and proper and which might as well perhaps be deduced from the evolutionary process. Nevertheless it must be admitted that such theory was the basis of and permeates the American constitutions and that in any event these constitutions disclose the rather successful struggle in this country for individual freedom and liberty.

We find these ideas well expressed in the provisions of the Massachusetts Constitution to the effect that the end of government is, among other things, "to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights, and the blessings of life," (Pre-

amble); also that, "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or *class of men*," (Article VII, Part First); and, in investing the general court with legislative power, "to make, ordain, and establish, all manner of *wholesome and reasonable* orders, laws, statutes, and ordinances." (Article IV, Sec. 1, Chapter 1, Part Second.)

The long struggle of mankind for individual liberty and freedom finally culminated in the American constitutions which generally recognized by a bill of rights or otherwise that government is ordained for the protection of the individual and his rights as against arbitrary or capricious exercise of power by those who for the time being represent the state, and that those exercising the functions of the state were not supreme. It must be admitted, until recently at least, that this protection has been fearlessly pronounced and guarded by the courts through the nullification of unreasonable statutes. Are we now to slip back several centuries to the autocratic days of the Tudors, when ideas of individual liberty were in eclipse?

On the contrary the law was correctly stated by Mr. Justice Brown in *Lawton* v. *Steele*, 152 U. S., 137, in the following language:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and,

second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.*"

The business of a train conductor is lawful. It is not only lawful but the laws of Texas require railway companies to have employes so named and the carrier, in the exercise of its good discretion, must employ those to perform such duties who are capable. The state may say to the carrier that it must do this, but it cannot impose an unusual or an unnecessary restriction as to whom it may engage.

We understand the rule, as established by the decisions of this court, to be that a regulatory statute of this kind which undertakes to restrict the constitutional right of liberty cannot be sustained unless it appears that the enactment has for its object the prevention of some offense or manifest evil or preservation of the public health, safety, morals or general welfare, and that there must also appear to be some clear, real and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do in some plain, appreciable and appropriate manner tend toward the accomplishment for which the power is exercised. The power cannot be used as a cloak for the invasion of personal rights or private property. Neither can it be exercised for private purposes *or for the exclusive benefit of particular individuals or classes.*

Constitutional provisions are adopted to meet practical conditions and for practical ends. They should be interpreted and enforced in a practical way, looking at the substance of the right and not its shadow. To indulge in conjecture or speculation for the purpose of sustaining a statute would be merely to fritter away rights guaranteed by a higher law.

Outside of the undisputed evidence in this case it is a matter of common knowledge that there are other ways and methods than mere service as a brakeman or conductor on a freight train for a period of two years by which the ordinarily intelligent man may qualify himself to safely assume and discharge the duties of a conductor on a railroad train. Yet it is proposed by this statute that a man shall not act as a passenger conductor without having previously been a brakeman or a conductor on a freight train. Suppose a railway company needs a passenger conductor and no one offers who has had that particular experience, but some sober, industrious and honest man appears who through dint of energy and close application has qualified himself in every way for the work at hand, is the Constitution so restrictive or inert, and are the liberties of the individual citizen so prescribed, as to deny to that man the right to follow such calling, or deny to the railway company the right to engage him simply because he has never been a freight conductor or brakeman? Railway companies are made responsible for the negligence of their employes and it is their duty to engage those for a particular service who are able and fitted to do it, and as such is the

duty and liability of the railway company may it not say that it may have some liberty and discretion in the choice of those employes?

We are not contesting the right of the state to prescribe reasonable tests of fitness, nor deny to it the right to say that persons engaging in an occupation which requires special skill shall possess a certain amount of knowledge and ability; but the statute in question does not do this. It is hardly a test of a man's qualification for one position to say that he must have previously filled another otherwise he is unfit. Let us assume for illustration that two men make application to the Texas & Gulf Railway Company for a position as conductor. One of them merely shows that he has acted as a brakeman on a freight train for two years. He may not be able to read and write. He may be stupid. He may be a moral renegade. The other has never been a brakeman on a freight train, but stands a perfect physical examination, has a certificate of good character, passes every test touching his fitness for the job, understands the book of rules, understands train signals, yet under this statute the railway company is denied a choice in the matter. The right of voluntary contract is taken away. The right of a man to engage in the occupation of a train conductor, though found to be well fitted, is denied him. No statute which would work such absurdity should be upheld under the guise of an exercise of the police power.

The situation seems to resolve itself into this, that railway companies in the discharge of their duties as common carriers must engage those to transact their

business who are reasonably well fitted or qualified to perform the same. But the Legislature of Texas, by virtue of the Act in question, in effect deprives them of this opportunity. At least the field from which their engineers and conductors must be taken is so restricted and no choice is really given to the employers as to who shall fill these positions. They are required to recruit from the ranks of the brakemen and the firemen, and in this connection we draw attention to the fact that there is nothing in the Texas Act under consideration which requires the railway companies to engage men as conductors and engineers *who are really qualified*. The Act does not require a person before engaging as a conductor or engineer to possess any knowledge whatever as to the duties of those positions. It makes no difference in this statute whether a man knows that a red light is a signal of danger or not; whether he is color blind or not; or whether he understands anything as to the mechanism of an engine, and yet he is allowed to operate an express train as an engineer provided he has had three years' experience as a fireman, and, citing again *Smith* v. *Alabama*, we feel that the statute in question does "prescribe an arbitrary condition to the grant." It may be presumed that this statute was enacted in good faith and in furtherance of some laudable object, still there are objections the courts will pass upon for themselves, and we understand it to be a principle well recognized that although a statute may seem fair upon its face yet if by its necessary operation it is destructive of rights guaranteed under the Con-

stitution it will be held invalid. Its necessary practical effect is of prime consideration.

Minnesota v. *Barber*, 136 U. S., 319.
Brimmer v. *Rebman*, 138 U. S., 78.
Henderson v. *Mayor of N. Y.*, 92 U. S., 259, 268.

While this court has sustained statutes of various kinds regulating professions calling for special skill or knowledge, or involving hazards, yet so far as we have examined, these statutes were general in character and the test provided had a direct connection with the end in view and tended to secure proper persons for the position. None of them limited the field of occupancy so that only a limited few would ever be in position to aspire. In this connection may be noted the case of *Eubank* v. *Richmond*, 226 U. S., 137.

Is it to be presumed that only a man who has worked as a brakeman or freight train conductor can possibly possess the requisite qualification to run a passenger or freight train? Is our Constitution so narrow as to deny to the honest thousands who are daily qualifying themselves for useful careers the right of pursuing the same merely because they have failed or been unable to occupy some minor position in the same service?

For answer we refer to the language of this court in *Allgeyer* v. *Louisiana*, 165 U. S., 578, 589:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the

> enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

This court in that case then referred with approval to the able concurring opinion of Mr. Justice Bradley, in *Butchers' Union Company* v. *Crescent City Company*, 111 U. S., 761 *et seq.*

The right of individual effort and to pursue a lawful calling is inherent in every individual in this country and we deny the power of any state to so limit a man's ambition as to deny to him the right not only to make a living but to choose his own occupation, except that if he proposes to follow one involving technical knowledge or hazard the Legislature may then prescribe reasonable tests of fitness and require the passing of an examination before an impartial board, all which tends in direct course to ascertain his fitness. But if two men are equally qualified and each passes a satisfactory general test it cannot negative the right of the one in favor of the other. It cannot create a monopoly in any given occupation like the castes of India. Such we believe to be the effect of the statute in question. It must be well known that many things are required of a conductor which are not required of a brakeman. The duties and responsibilities are not the same, nor is the knowledge of the one the same as must be that of the other as pertains to the business in hand, and the qualification prescribed by this statute as a

sole ground of fitness does not indicate a reasonable test, nor do the duties of a brakeman necessarily qualify him alone as a conductor. Hence the enforcement of this statute does not, therefore, accomplish the supposed purpose of insuring the employment of fit men for the positions named.

II.

THE STATUTE AS ENFORCED IS SHOWN TO UNREASONABLY INTERFERE WITH THE CONDUCT OF INTERSTATE COMMERCE BY THE RAILWAY COMPANY AND THE DEFENDANT AND IS, THEREFORE, INVALID AS AN ATTEMPT TO REGULATE THE CARRYING ON OF INTERSTATE COMMERCE.

It appeared in this case that the train on which defendant was acting as conductor contained a number of cars of freight originating in Texas and destined to various places in Kansas, Oklahoma and Missouri, and that the train in question was operated by him with safety; that he knew how to perform all the details of the work as the conductor thereof.

It is also well known at the present day that there is scarcely a car moved in any train upon any railroad in this country that does not contain interstate freight and that in carrying on its business a railway company in respect to the operation of its trains is engaged to a very large extent in interstate commerce. In order to carry on that commerce it is essential that no unreasonable restriction be placed upon the railway company in the employment of men to carry on its business. If the railway company be unduly hampered and restricted in its right to employ agents to carry on its interstate business

by having the field of employment unreasonably restricted it is manifest that such restriction in a very material and practical way will affect the carrying on or conduct of its interstate business.

It is manifest also that the defendant who was fitted in every way to engage as an agency of the railway company in the conduct of the business of interstate commerce was denied that right by an unreasonably restrictive statute and the statute directly affected him,—preventing him,—as such agency from engaging or assisting in the carrying on of interstate commerce. The statute of the state is general in language affecting interstate as well as state commerce, and, as applied in this particular case, did affect and unreasonably burden the carrying on of interstate commerce.

While it is true that in the absence of congressional legislation covering the field, a state in the exercise of its police power may adopt reasonable regulations which incidentally affect those engaging in interstate commerce, yet in cases upholding the exercise of such power this court has generally found that the statutes were in aid of and reasonably intended to facilitate such commerce and did not unduly restrict or hamper the carrying on of the same. Even in such cases this court holds that the local regulation must have a real relation to the suitable protection of the people of the state and be entirely reasonable "and should not arbitrarily restrict the facilities upon which it" (movement of interstate traffic) "must depend."

Opinion in *Adams Express Co.* v. *City of New York*, decided January 5, 1914.

Savage v. *Jones*, 225 U. S., 525.

But where the local regulation constitutes an unreasonable burden upon interstate commerce it has been held unconstitutional by this court even in the absence of congressional legislation covering the field.

Yazoo & Mississippi Railroad v. *Greenwood Grocer Co.*, 227 U. S., 1, 3.

Houston & Texas Central Railroad v. *Mayes*, 201 U. S., 321.

Central of Georgia Railway Co. v. *Murphy*, 196 U. S., 194, 203, 204.

If the railway company is not permitted to employ men to assist it in carrying on its interstate business who are shown to be competent for that line and is confined to a narrow field of selection from a class whose members may or may not be competent for the work, does not such a restriction directly burden and impede the carrying on of that business? And how can such statute be sustained as not an interference with such business, where, upon its face, it appears to be unduly and unnecessarily restrictive? Again, by unreasonably denying the defendant the right to co-operate in carrying on such business when he is reasonably fitted for the same, there is a burden placed upon the carrying on of interstate commerce which is not reasonably justified. The defendant cannot be deprived of the right of co-operating and engaging in interstate commerce transactions by any state unless he is in fact unfitted for the same because this right is one derived under the Constitution and laws of the United States.

Concluding, therefore, we submit that the statute in question is invalid because it is subversive of civil liberty. It is class legislation. It is an arbitrary interference by the Legislature with the lawful right of the individual to contract. It is an unnecessary use of the power of the state without a corresponding benefit. It unreasonably hampers and impedes commerce. It destroys the efficiency of the railway service. It does not accomplish the purpose remotely intended as no examination is required of a brakeman before he enters the service and yet it gives to him an exclusive right for a more responsible position to the exclusion of other men who may in every other way be more suited.

We respectfulliy submit that upon the one ground or the other, if not upon both, this statute is violative of the Federal Constitution.

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APPENDIX.

RAILROAD COMPANIES—REQUIRING ENGINEERS OR CONDUCTORS TO SERVE FIRST AS FIREMEN OR ENGINEERS.

S. B. No. 117. Chapter 46.

An Act to provide adequate punishment for any person who shall engage or act in the capacity of a locomotive engineer, or train conductor, upon any railroad in the State of Texas, without having first served three (3) years as a locomotive fireman, or engineer, or if engaged as a conductor on any railroad train in this State, he shall be punished as herein provided if he engages to so act without first having served two (2) years as a brakeman, or conductor of a freight train. To punish any person who shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of this Act, but exempting lines operating of less than twenty-five miles in length from the operation of this Act.

Be it enacted by the Legislature of the State of Texas:

SEC. 1. If any person shall run or operate any locomotive engine upon any railroad in the State of Texas, without having served three (3) years prior thereto as a fireman or engineer on a locomotive engine, he shall be deemed guilty of a misdemeanor, and he shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dol-

lars, and each day he so engages shall constitute a separate offense.

Sec. 2. If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense.

Sec. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of the provisions of the two preceding Sections of this Act, he shall be deemed guilty of a misdeameanor, and shall be punished by a fine or not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense.

Sec. 4. Nothing in this Act shall be construed as applying to the running or operating of engines, in taking said engines to or from trains at division terminals by engine hostlers, or of the shifting of cars or making up trains, or doing any work appurtenant thereto at engine houses, tram or freight yards by switchman or yardman, or in the case of the disability of an engineer or a conductor while out on the road between division terminals. In case of emergency where such companies cannot obtain the employes mentioned in this Act who have the qualifications prescribed by the provisions there-

of, then such companies may employ temporary firemen, engineers and conductors who have not the qualifications prescribed by this Act, but no such employment shall continue longer than such companies can supply their respective places with men who have the qualifications prescribed by this Act, and provided further, that nothing herein contained shall relieve any of such companies from the negligence of any of its employes.

Sec. 4a. The provisions of this Act shall not apply to any railroad company within this State or the receiver, lessee thereof, whose line of railway is less than twenty-five miles in length.

Sec. 5. The fact that there are now no adequate laws in this State prohibiting the running of locomotives and trains on railroads by inexperienced engineers and conductors, thus endangering the lives of the traveling public and employes of said railroads, creates an emergency and an imperative public necessity requiring the suspension of the Constitutional rule, which requires bills to be read on three several days in each House, and the rule is hereby suspended; and that this Act take effect and be in force from and after its passage, and it is so enacted.

(Note.—The enrolled bill shows that the foregoing Act passed the Senate by a two-thirds vote, yeas 24, nays 0; and passed the House, the vote not being given.)

Approved March 11, 1909.

Takes effect ninety days after adjournment.

3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 268

W. W. SMITH,
Plaintiff in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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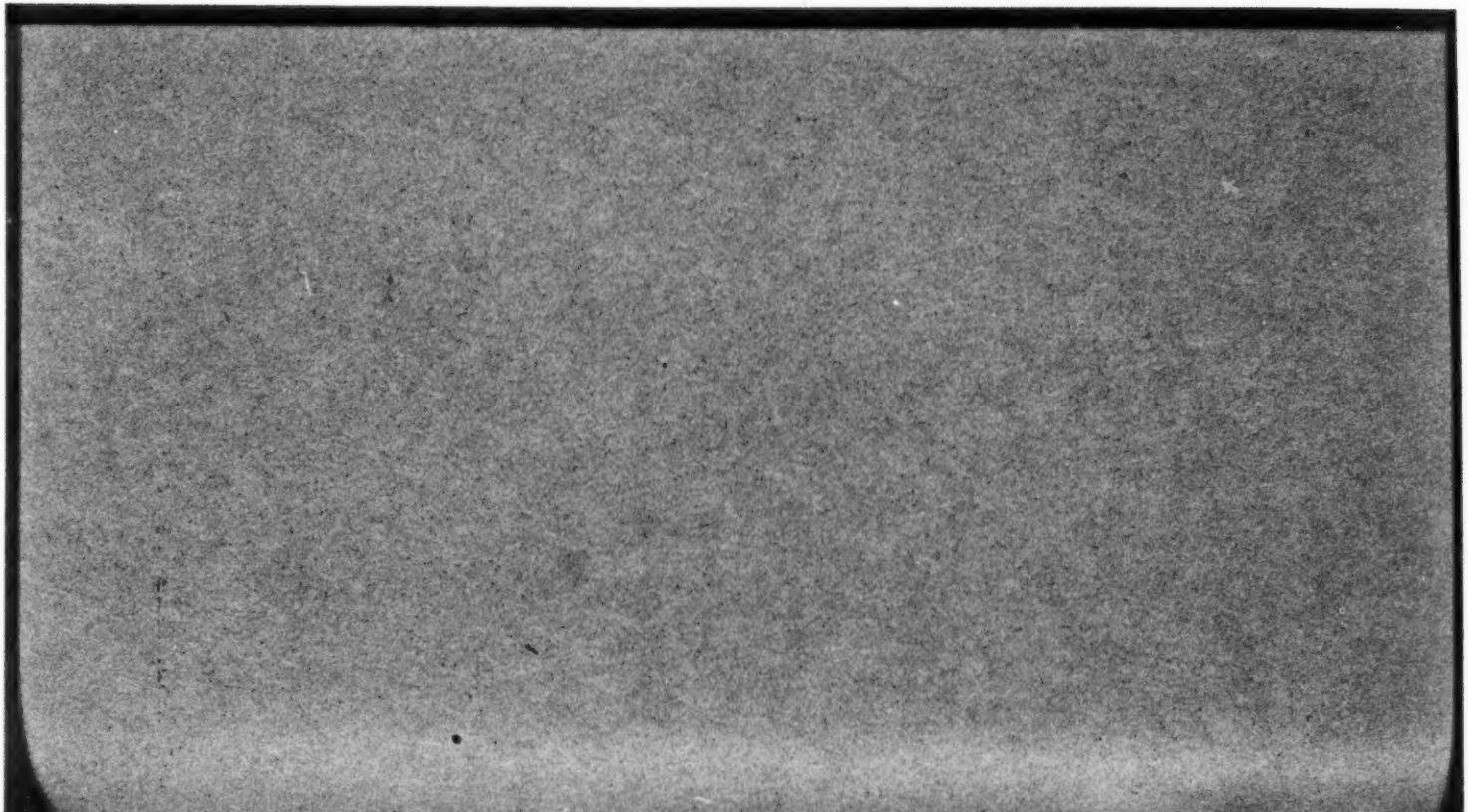

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It is contended that the statute in question is designed to secure *qualified* conductors and that no objection can be made to a statute which prohibits *unqualified* men from occupying responsible positions in train operation. The statute specifies but a single qualification, namely, employment for a given period in another line of work, and rejects every other qualification. To confine or restrict the right to engage in a lawful occupation to a sole qualification fixed by statute and without giving a party an opportunity to be heard as to his experience and fitness certainly deprives him of his constitutional

right by an arbitrary measure which makes no provision for a hearing. Such a measure can only be upheld when it excludes only the inexperienced and the unfit. As the statute did not provide for an examination it was evidently not designed to secure competent or fit men as contradistinguished from those who are solely qualified under the statute for the position.

It may be conceded, as contended, that no one has a right to pursue any calling the proper prosecution of which requires a certain amount of technical or professional skill and lack of which may result in material injury to the public or individuals, unless he has requisite knowledge or skill. But it was shown by the undisputed evidence in court that Smith had all the technical knowledge and skill necessary for the position and indeed had more knowledge as to the duties of a train conductor than was likely to be obtained in mere service as a brakeman. While the evidence was admitted the effect of it was rejected by the court solely upon the ground that the statute in terms excluded him from the right to engage in that occupation. So up to the present time he has had no opportunity to show or demonstrate his fitness or competency before any tribunal bound to act impartially upon his showing.

It may also be conceded that a state legislature may determine what particular trade, business or occupation requires regulation and may adopt regulations for the same provided they be uniform and reasonable and so applied as not to deprive anyone of engaging in such trade, business or occupation for which he is prepared to show that he is fitted and

has the requisite skill and knowledge, and that one class which is validly regulated cannot complain that those in another and different class are not likewise regulated. But all that falls far short of the present case. The defendant below was denied a constitutional right and was afforded no opportunity to be heard for its protection.

In *Dent* v. *West Virginia*, 129 U. S., 123, relied on by the State, the statute, after permitting those presumed to be well qualified to continue in practice by reason of the prior practice of their profession, also provided an opportunity for all others to be examined and heard before a board of medical experts. In that case it was said:

> "If they (the qualifications) are appropriate to the calling or profession, and attainable by *reasonable study or application*, no objection to their validity can be raised because of their stringency or difficulty."

It is further contended by the state that the state legislature has the power to prescribe that from a given state of facts, that is, previous service in a similar occupation, the presumption of fitness to pursue the occupation of a passenger conductor shall arise, and "that proof of the existence from the state of facts from which the presumption arises, should be taken as conclusive and *exclusive evidence* of the fitness of a passenger conductor." If that proposition were sound, and the conditions prescribed by the legislature was not only conclusive but *exclusive evidence* of fitness, then it would be an idle ceremony for the courts to ever undertake to investigate or determine the validity of state legislation. No state statute could then be set aside by the courts. On

the contrary a constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment, and a state legislature cannot make one fact even *prima facie* evidence of the main fact in issue where there is no rational relation between the two facts and the inference is purely arbitrary. See:

Bailey v. *State of Alabama*, 219 U. S., 219.

With reference to the case of *Hawker* v. *New York*, 170 U. S., 191, relied upon by the State, it seems to have been simply held that a statute of New York, relating to the public health, providing that any person who, after conviction of a felony, should attempt to practice medicine, or should so practice, should be guilty of a misdemeanor, etc., did not conflict with Article I, Section 10, of the United States Constitution forbidding a State to pass any Bill of Attainder, or *ex post facto* Law or law impairing the obligation of contracts. Hawker had been convicted of the crime of abortion and sentenced to imprisonment. A subsequent statute, as above stated, made it a misdemeanor for anyone convicted of a felony to attempt to practice medicine. It is safe to say that anyone convicted of a felony, and particularly of committing a criminal abortion, was unfit to engage in the practice of medicine or pursue a profession which required the highest character and good faith towards the public. It may be contended, of course, that one convicted of a crime may reform, but unfortunately one of the consequences of such a conviction has in the past been to place the convict among the outcasts of society and there is a prevalent feeling in the community that such an indi-

vidual is no longer worthy of trust, but that he will always require watching. The consequences may be unfortunate in some instances, but one committing a crime takes the chance. In view of the strong dissenting opinion in that case it is evident that all of the language in the majority opinion is not to be taken too literally. In the majority opinion it is said:

> "But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidence of that character. We do not mean to say that it has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test."

Hawker had been tried, had had his day in court and was found to be a criminal. Another trial or a hearing on such question was wholly unnecessary.

That a state legislature cannot make one fact conclusive evidence of the main fact which involves the rights of parties, or make the certificate of an executive officer conclusive evidence of the fact stated without violating the due process of law clause, is illustrated in an interesting opinion of the Supreme Court of Oklahoma in *Taylor* v. *Anderson et al.*, 137 Pac., 1183, decided January 13, 1914, and in which a number of authorities upon the above proposition are cited.

On page 15 of the State's brief, it is stated:

> "It is common knowledge that, in this state, the railroads themselves have established the

> custom or rule that those who expect to become either freight or passenger conductors must begin their service in the capacity of freight brakemen. The rule of seniority applies."

There is nothing in the record to warrant such statement, but as the State has gone outside of the record in referring to such matter we beg to suggest that this statute was not passed at the instance or for the benefit of the railroad companies; also that the railroad companies are frequently forced to adopt certain rules or regulations at the instance and upon the demand of the trainmen's unions, and it is safe to say that the Texas statute was passed to subserve the interests of the brakemen's and firemen's associations and to give their members a monopoly, as that is the obvious and natural result.

With reference to *Bradwell* v. *Illinois*, 16 Wallace, 130, relied upon by the State, it is sufficient to say that it was simply held by this court that the ruling of the Supreme Court of Illinois, holding that females were not eligible at common law to practice in the courts of that State, did not deprive the plaintiff of a right or privilege of a citizen of the United States. The concurring opinion of Mr. Justice Bradley is devoted to demonstrating that according to the prevalent common law notion women were regarded as unfitted and incapacitated from engaging in such a profession, and that, therefore, the plaintiff was not deprived of any constitutional right.

The case of *Ex parte Lockwood*, 154 U. S., 116, simply follows the case of *Bradwell* v. *Illinois*.

Whether Mr. Justice Bradley's reasoning would *now* be regarded as somewhat artificial or not it is nevertheless true that distinctions may be made even by the legislature on account of sex as such distinctions have been prevalent at common law, and that different regulations may be applied to women or minors engaging in work or occupations than would be applicable to men.

It is also true that with reference to the medical and legal professions it is well recognized that a certain amount of study and experience is necessary to properly equip one to practice such a profession, and that the requisite learning necessary can only be secured by a course of study and attendance in schools adapted for such purposes.

Without repeating the arguments suggested in our former brief we merely wish to State that this court cannot be accused of having unduly extended the provisions of the Fourteenth Amendment. Indeed, it is well known that many of the State courts have gone much farther in setting aside statutes as violative of that Amendment. In this connection we might call attention to an article of the late Attorney General on "Police Power" in the Harvard Law Review for February, 1914. While the attitude of this court on these questions has been conservative, as it no doubt ought to be, yet it has not hesitated to set aside as unconstitutional State statutes of an arbitrary and unreasonable nature and such as were not passed in the *bona fide* execution of the police power of the State.

The statute here involved is so unreasonable, ar-

bitrary and exclusive in its nature as to leave but little room for any pretense that it was passed solely for the protection of the public or that it did not unduly and unreasonably restrict the constitutional rights of the defendant.

Respectfully submitted,

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INDEX.

ARGUMENT AND PROPOSITIONS.

LIST OF CASES CITED.

No. 268.

IN THE

Supreme Court of the United States.

W. W. SMITH, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR THE DEFENDANT IN ERROR.

I. SCOPE OF THE STATUTE.

While Section 2 of the act provides that "if any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a line of railroad, he shall be deemed guilty of a misdemeanor," etc., the act does not, under the construction given this section by the Court of Criminal Appeals of Texas, in the case of J. T. Byrne vs. State, 132 S. W. Rep., 173, require:

1. That the prior service shall have been had *within* the State of Texas; or,

2. That the prior service shall have extended through the *next preceding* two years, it being there held that two years' service in another State several years before the time of the alleged offense met the requirements. In the Byrne case it was proved without

contradiction that Byrne had not served as a brakeman or freight conductor at all within the State of Texas, and that he had not served as such during the two years next preceding the time of the commission of the alleged offense, this being testified to by both the State's witness, Lovick, statement of facts, page 2, and by the defendant Byrne himself. (Statement of Facts, pages 3-5.) Byrne, however, testified that he entered the railway service in 1881 as a brakeman of a freight train in Missouri, and served in that capacity for three years. "I was then promoted to the position of conductor of a freight train, and served in that capacity for three years." (Statement of Facts, page 2.) The alleged offense for which he was prosecuted being committed November 2, 1909. (Statement of Facts, page 2.) Byrne had been engaged in other branches of railroad work from the time he had served as a brakeman and conductor, i. e., 1881-1887, up to November 2, 1909. (Statement of Facts, pages 2-3.) Byrne was convicted in the trial court, but upon appeal the Court of Criminal Appeals reversed the judgment of conviction, saying:

"It will be noted that the act does not require that the party acting as conductor shall serve two years as freight conductor within the State of Texas before he can engage in acting as conductor. The evidence is uncontroverted that appellant had acted as conductor for quite a number of years in the State of Missouri, and that he had been continually in the railroad service since 1881, several years of which he was employed as conductor on freight trains. We find that the evidence is totally insufficient to sustain the conviction. * * * Appellant has demonstrated by his testimony that he was not within the purview of the statute."

By Section 4, the provisions of Sections 1 and 2 are made inapplicable to the following cases:

1. The shifting of cars or making up of trains, etc., at yards.

2. The disability of the conductor while out on the road between division terminals.

3. Cases of emergency where railroad companies cannot secure conductors having the previous experience required, etc.

II. FIRST PROPOSITION.

GENERAL PURPOSE OF ACT WITHIN POLICE POWER OF STATE.

The act was evidently intended by the Legislature to be an exercise of the police power of the State to secure the safety of passengers and employes and property carried on passenger trains. This seems apparent from the nature of the provisions themselves; it is made very clear by the express declaration of the Legislature through the emergency clause of the act, wherein it is said: "The fact that there are now no adequate laws in this State prohibiting the running of locomotives and trains on railroads by inexperienced engineers and conductors, thus endangering the lives of the traveling public and employes of said railroads, creates an emergency," etc.

That the purpose intended to be served by this enactment bears a real substantial relationship to the safety of passengers and train operatives and property; that the proper accomplishment of this purpose lies within the limits of the due exercise of the police power of the State is too clearly apparent to merit extended discussion, for, as said by this court in Lochner vs. New York, 198 U. S., 53: "There are, however, certain powers existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without at present any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. Mugler vs. Kansas, 123 U. S., 623; In re Kemmler, 136 U. S., 136; Crowley vs. Christenson, 137 U. S., 86; In re Converse, 137 U. S., 624."

The general purpose of the act being clear, and the due accomplishment of such purpose by the State being undoubtedly harmonious with constitutional requirements, we think there can be no controversy over the proposition that the *general plan*, or prin-

ciple, for the accomplishment of such purpose as designed by the act is also legitimate. The act is designed to secure *qualified* conductors. Section 4, which contains a statement of the conditions or contingencies under which the provisions of Section 2 are inapplicable, among other things, declares: "In case of emergency where such companies cannot obtain the employes mentioned in this act *who have the qualifications* prescribed by the provisions thereof, then such companies may employ temporary * * * conductors *who have not the qualifications* prescribed by this act, but no such employment shall continue longer than such companies can supply their respective places with men *who have the qualification* prescribed by this act," etc. The act, therefore, seeks to secure men for these positions *who are qualified* properly to operate the trains. No man should be permitted to operate a train who is not fit to do so, because the proper operation of the train is essential to the safe transportation of the passenger and the employe; unfitted operatives invite disaster to life and limb. No constitutional fault can be found in a State enactment which prohibits *unqualified* men from occupying responsible positions in train operation.

Smith vs. Alabama, 124 U. S., 465.

N. C. & St. L. Ry. Co. vs. Alabama, 128 U. S., 96.

That the State may rightfully prevent *unqualified* men from occupying the position of conductor of a passenger, etc., train, therefore, cannot be denied. And in doing so the State does not:

I. Unconstitutionally interfere with the right of contract, because:

The State has the power to prevent individuals from making certain kinds of contracts in regard to which the Federal Constitution offers no protection.

Smith vs. Alabama, 124 U. S., 465.

N. C. & St. L. Ry. Co. vs. Alabama, 128 U. S., 96.

Olsen vs. Smith, 195 U. S., 332.

Otis vs. Parker, 187 U. S., 606.

Holden vs. Hardy, 169 U. S., 366.

Northern Securities Co. vs. U. S., 193 U. S., 197.

St. L. I. M. & S. Ry. Co. vs. Paul, 173 U. S., 404.

Knoxville Iron Co. vs. Harbison, 183 U. S., 13.

Allgeyer vs. Louisiana, 165 U. S., 578.

II. Or unconstitutionally interfere with the right to pursue a lawful occupation, for:

A man has no right to engage in or pursue any calling, the proper prosecution of which requires a certain amount of technical knowledge or professional skill, the lack of which may result in material injury to the public or individuals, which can be controlled in all cases, or, in proper cases, be taken away by State legislation.

Lochner vs. New York, 198 U. S., 53.

Smith vs. Alabama, 124 U. S., 465.

N. C. St. L. Ry. Co. vs. Alabama, 128 U. S., 96.

Olsen vs. Smith, 68 S. W. Rep., 320; s. c., 195 U. S., 332.

1 Tiedeman on State and Federal Control of Persons and Property, page 242.

III. SECOND PROPOSITION.

THE LEGISLATURE HAVING THE POWER TO PREVENT UNQUALIFIED MEN FROM PURSUING THE OCCUPATION OF CONDUCTORS, HAD ALSO THE POWER TO CLASSIFY AND THE POWER TO PRESCRIBE THE ONE QUALIFICATION OF PRIOR SERVICE.

The necessary effect of the decisions in the Smith case, supra, and N. C. & St. L. Ry. Co. vs. Alabama, supra, was to sustain the validity of a State law which *prohibited*, in its effect, certain men, who were not qualified according to the statute, from engaging in or pursuing the occupation of train engineers. No just criticism, therefore, can be leveled at the Texas statute under consideration because of the fact that its effect may be to deny to certain persons the right to engage in the calling of passenger conductors or to deny to railway companies and these men the right to enter into contracts of employment in this respect. The only possible question is: Has the denial of these rights been brought about by the

State in due course? Or, interrogatively, to paraphrase appellant's contention: Were the qualifications prescribed by the Legislature so unreasonable and arbitrary as to be void? A consideration of the proper viewpoint, the scope of the Legislature's discretion, and the effect of the act will, we believe, produce a negative for appellant's complaint.

First: *As to the viewpoint:*

When the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. If the end which the Legislature seeks to accomplish be one to which its power extends, although not the wisest or best, are yet not plainly and palpably unauthorized by law, the court cannot interfere.

McCulloch vs. Maryland, 4 Wheaton, 316, 421.

The presumption is in favor of the validity of the statute; the Legislature must be permitted a wide discretion as to the selection of the means to the end.

License Cases, 5 Howard, 504.

Soon Hing vs. Crowley, 113 U. S., 703.

"When a State Legislature has declared that, in its opinion, policy requires a certain measure, its action should not be disturbed by the court under the Fourteenth Amendment unless they can clearly see that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched."

Missouri, etc., Ry. Co. vs. May, 194 U. S., 267.

As said by this court in Gundling vs. Chicago, 177 U. S., 183, 188, "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and *what* such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant

in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

"And the courts in passing upon the validity of a statute, should hold strongly to the presumption that the Legislature had, in the enactment of the police regulation under inquiry, the sole desire and intention of thereby promoting the public health, comfort and *safety*, by the prohibition of some act injurious thereto. If the statute admits of two constructions, one of which is a reasonable exercise of the police power and the other is unreasonable, in that it promotes or does not promote the public interests, the former construction should be adopted, and the statute sustained as a constitutional exercise of the police power."

People vs. Warden of City Prisons, 141 New York, 529.

1 Tiedeman on State and Federal Control of Persons and Property, page 235.

Second: *As to the discretion exercised and its effect in the passage of this act:*

The State having determined the "trade, business or occupation" to which the "regulation" shall apply, and having also determined "what such regulations shall be," as held it may do in Gundling vs. Chicago, supra, as thus determined, are such "regulations" "so utterly unreasonable and extravagant in their *nature* and *purpose*" as to be void? As said before, we think the *purpose* of the regulation is so clearly devised to secure the safety of the passenger and the employe that no legitimate question can be made against the statute on this score, and we shall treat the question involved as being restricted to an examination of the *nature* of the *regulation*.

The *nature* of the regulation is such as to secure men for the positions of passenger conductors who are *qualified* therefor; the *qualification* prescribed is previous *experience* in the same or a

similar occupation. The evil to be remedied was the operation of passenger trains by *inexperienced* conductors, "thus endangering the lives of the traveling public and employes of said railroads." Section 5 of the act. "The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity." Dent vs. West Virginia, 129 U. S., 122. *Experience* may well be treated as a *qualification* by the State. Dent vs. West Virginia, 129 U. S., 123. In the case last cited a statute of the State of West Virginia provided that "the following named persons, *and no others*, shall hereafter be permitted to practice medicine" in that State. Among those mentioned as being eligible to practice were "all persons who have practiced medicine in this State for the period of ten years prior to the eighth day of March, 1881," and the court said "there is nothing of an arbitrary character in the provisions of the statute," etc., page 124. The Legislature of West Virginia evidently thought and determined that previous *experience* was a sufficient *qualification* for a person proposing to pursue the practice of medicine, and the court manifestly thought that the recognition of this qualification as being sufficient by the Legislature was not "of an arbitrary character."

That *experience* is a sufficient qualification for the practice of medicine, upon which to base legislation, is again recognized by this court in Watson vs. Maryland, 218 U. S., 173. In that case was involved a statute of the State of Maryland which required registration of physicians, and which provided, among other things, that "All persons except physicians who were practicing medicine in this State prior to the first day of January, 1898, who are now practicing medicine or surgery and can prove by affidavit that within one year of said date said physician had treated in his professional capacity at least twelve persons, who shall commence the practice of medicine or surgery in any of their branches after the eleventh day of April, 1902, shall make a written application for license to the president of either board of medical examiners," etc. It was contended by the appellant in that case that the statute

violated the Fourteenth Amendment to the Federal Constitution in "denying to the plaintiff in error the equal protection of the laws, in that it makes unreasonable and arbitrary distinctions in its classification of physicians, including some and excluding others, and in making unreasonable omissions of certain classes from the requirements of the act, as shown in the exemption of certain classes from its requirements," pages 175-176.

To this contention the court replied: "In such statutes there are often found exceptions in favor of those who have practiced their calling for a period of years. In the *Dent case*, supra, an exception was made in favor of practitioners of medicine who had continuously practiced their profession for ten years prior to a date shortly before the enactment of the law. Such exception proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years *may be assumed to have the qualifications* which others are required to manifest as a result of an examination before a board of medical experts. * * * Conceding the power of the Legislature to make regulations of this character, and to exempt the experienced and accepted physicians from the requirements of an examination and certificate, the details of such legislation rest primarily within the discretion of the State Legislature. * * * We see nothing arbitrary or oppressive in the classification of physicians subject to the provisions of this statute which excludes from its requirements those who have practiced prior to January 1, 1898, and were able to show that they had treated at least twelve persons in a professional way within a year prior to that date," pages 177, 178. Now, bearing in mind that, as said by the court in State vs. Loomis, 115 Missouri, 307, quoted with approval by this court in C., C. & S. F. Ry. Co. vs. Ellis, 165 U. S., 155, "the differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regualtions," it becomes clear that previous service was regarded by the court as being a sufficient and reasonable qualification for one who desires to practice medicine if a Legislature

cares to recognize it as such, and is sufficient ground upon which to exempt those who possess it from the burdens of the law imposed upon others desiring to engage in the same calling. It is also manifest that the Legislature would be empowered to enact "separate laws and regulations" for those of previous experience and "separate laws and regulations" for those without previous service.

Obviously it is "the province of the State Legislature to provide the nature and extent of the legal presumption to be deduced from a given state of facts and the creation by law of such presumptions is after all but an illustration of the power to classify."

Jones vs. Brim, 165 U. S., 180, 183.

Hawker vs. New York, 170 U. S., 197, 198.

All the Legislature of Texas has done in the passage of this statute was, in the exercise of its power to classify, to say that from a given state of facts, i. e. previous service in a similar occupation, the presumption of fitness and qualification acceptably to pursue the occupation of a passenger conductor shall arise and that proof of the existence of the state of facts, from which the presumption arises, shall be taken as conclusive and exclusive evidence of the fitness of a passenger conductor *when* he is found pursuing this occupation in the employment of a railway company. It is well to remember here that the statute in no way seeks or tends to say that a railway company must accept as fit all men who have had the requisite previous experience; it simply requires that when the railway company comes to employ a man as a conductor for its passenger train it shall select some man of previous service in the same line of calling. As between all the men of previous experience, the railway company may select any who may, *by it*, be deemed worthy and satisfactory, and if it be said that other qualifications than service be needed in these employes these other qualifications will surely be attained through the play of the self-interest of the company. The railway company is held to strict accountability for the acts of its employes;

the management of its business and property is in their immediate charge, and to the company they must render strict account of their stewardship: self-defense, therefore, in the natural course of things, will result to secure men for these positions who are honest, who have good judgment, who are alert and who will guard with most zealous care the interests both of the company and the public. The statute does not greatly restrict the play of the sound discretion of the railway company; it only requires that among the *various* qualifications deemed needful by the company the employe *must* have the *one;* from the vast army of men having in common the *one* qualification, the company may select whom it pleases. Until the contrary is made to appear, it surely must be assumed that the vast railway industry of the nation and the world will always furnish an adequate supply of men of experience from whom the Texas companies will be able to employ men otherwise satisfactory to itself. But if the unexpected should happen, and this should not be true at any time or place, express provision is made by the statute, Section 4, for this emergency through a relaxation of the experience requirement while the emergency condition exists.

But plaintiff in error says that the statute, because it makes previous experience as *one* of the qualifications of a passenger conductor absolute, is void, because this requirement is utterly unreasonable and arbitrary. We think reason and authority is the other way.

There is a clear analogy between the exercise of the power involved in this respect in the Texas statute here in question and the exercise of a similar power in statutes which provide that no person shall be permitted to practice medicine after having been convicted of a felony. In such statutes, an extensive list of which is contained in a note to the decision of this court in Hawker vs. New York, 170 U. S., 191, 193, where good moral character is made one of the qualifications for a practitioner, *conviction* of a felony is made conclusive evidence that such good moral character does not exist. Argument is here made that *previous experience,*

as a qualification, is not infallible evidence of fitness; the same argument can be made against the provision that a conviction of felony shall be taken as conclusive evidence of bad character, for, despite the high quality of our judiciary and judicial machinery, no doubt innocent men have been convicted of felonies, and it is altogether possible that good moral character may exist, as a fact, in many men who have been so convicted, and may have always so existed in them; besides, there is always the possibility of reformation, so that a man who has been rightfully convicted may have subsequently rebuilt the structure of his character so as to be entirely worthy of trust and confidence. In such cases, in a a sense, the provision that *conviction* shall be taken as conclusive and unrebuttable evidence of bad character is arbitrary, unreasonable and indefensible; and yet the Legislature may go that far without infringing upon the requirements of the Fourteenth Amendment.

In the Hawker case, supra, the argument was made in favor of the statute that the State, with reference to practitioners of medicine, "may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character." This argument this court endorsed, saying in that connection: "No precise limits have been placed upon the police power of a State, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power." (Pages 192-193.) The Legislature has gone no further than that here; in fact, it has not attempted to go so far, but has only prescribed *one* of the qualifications of the man who would pursue an occupation, the performance of which is inseparably joined with the safety and welfare of those who travel by rail and those who work upon passenger trains. This statute does not attempt to deal with the moral qualifications of the man; that is left to the

judgment of the railroad company. It simply deals with the man's *learning* as a qualification in the particular calling. The power to deal with the one qualification would seem to be coextensive with the power to deal with the other: "Character is as important a qualification as knowledge, and if the Legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished." Hawker case, page 194. In this statute, in effect, the Legislature has prescribed "a definite course of instruction," towit: two years' service in the same or a similar calling, and has provided that the *fact* of such prior service shall be taken as evidence of qualification as to *knowledge* of the technique of the profession. In this case, plaintiff in error admits that the calling of a passenger conductor is rightfully subject to regulation through the police power. On page 37 of his brief, his counsel say: "We are not contesting the right of the State to prescribe reasonable tests of fitness, nor deny to it the right to say that persons engaging in an occupation which requires special skill shall possess a certain amount of knowledge and ability; but the statute in question does not do this." We reply that, if the State may require "a certain amount of knowledge and ability," it may say just what the evidence of the same shall be, so long as the test prescribed, according to the experience of mankind, "reasonably tends to prove the fact." Mankind has but one mind upon the proposition that "Experience is the best teacher." Is it necessary that the man who has for years tilled the soil and caused it to produce bumper crops be required to produce a sheepskin subscribed by the authorities of an agricultural college in order to prove himself a good farmer? A man who has built locomotive engines in the shops for years is likely to prove as efficient in building another one as he would have been if his shop experience had been substituted for cloister perusal of books written upon the subject by a professor and class-room construction of blue-prints and models. The worthy graduate of the University of Experience needs no diploma to prove his efficiency. With reference to the character qualifications, this court in the

Hawker case said: "We do not mean to say that it (Legislature) has an arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. County Seat of Linn County, 15 Kansas, 500, 528. Whatever is ordinarily connected with bad character, or indicative of it, may be prescribed by the Legislature as conclusive evidence thereof. It is not the province of the courts to say that other tests would be more satisfactory or that the naming of other qualifications would be more conducive to the desired result. These are questions for the Legislature to determine. 'The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity.'" Dent vs. West Virginia, supra, page 195. We submit that the statute here involved meets the requirements of these principles: It makes *experience* the conclusive test; the *fact* required to be proved is *knowledge* of the technique of the occupation; certainly *experience* "tends to prove the *fact*," has a "relation" to knowledge, and is "ordinarily connected with and indicative of it."

Plaintiff in error, however, complains that *experience* is not a fair test, and as illustrative of the result of the test he says that the man who has served two years as a brakeman on a freight train "may not be able to read and write; he may be stupid; he may be a moral renegade."

Suffice it to say to this that the railway company is not compelled, either by any law or by circumstance, to employ the illiterate or stupid man or the moral renegade; it has the whole vast army of those who have had the experience anywhere in the world (Byrne vs. State of Texas, 132 S. W. Rep., 173) from which to make its selection, and surely all of these men are neither stupid and illiterate, or moral renegades. This court has foreclosed the proposition by saying that it is no objection that the test is not in all cases "absolutely certain, and that sometimes it works harshly." Hawker case, 170 U. S., 197. If the test is reasonably well calculated to produce the desired result, it is sufficient; other

tests, equally efficient and more satisfactory, might be prescribed, but this selection is confided to the Legislature.

The statute, in its practical effect, complies with the rule announced in Dent vs. West Virginia, 129 U. S., 122, as follows: "If they (the qualifications) are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty." There is nothing in law or conditions to prevent any man from entering the calling of a freight train brakeman, and there appears to be no dearth of applicants for these positions. It is common knowledge that, in this State, the railroads themselves have established the custom or rule that those who expect to become either freight or passenger conductors must begin their service in the capacity of freight brakemen. The rule of seniority applies. From a brakeman a man may become a freight conductor, and, usually, from freight conductor he is promoted to the position of passenger conductor. This is the usual course, and the statute, in its practical effect, lays no increased burden upon the employe. It was because of the fact that on occasion some of the railroads did not hold to this course but placed inexperienced men in charge of their trains, and because there were no "adequate laws in this State prohibiting the running of locomotives and trains on railroads by inexperienced engineers and conductors, thus endangering the lives of the traveling public and employes of said railroads," the Legislature, as a matter of law, adopted the very tests theretofore held to by the roads themselves, and required their observance. We see nothing unreasonable in the requirement that the man who would fill the responsible position of conductor in charge of the operation of trains freighted with human life should prepare himself by a two years' course of study in that branch of the school of experience where human life is not constantly at stake. It is no objection to the statute that the rule may be regarded as stringent; it may be met with "reasonable study or application" by any and all alike and upon equal terms.

The requirement of prior service fixed by the statute is not

new in principle or application. As illustrative, consider the case of the lawyer. In Ex Parte Garland, 4 Wallace, 333, 379, this court said that the Legislature may undoubtedly prescribe qualifications precedent to entering this profession to which the applicant must conform, "as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life." In order for one to be qualified to practice in the Supreme Court of the United States, he must have practiced for a certain number of years in the Supreme Court of his State. Of course, it is barely possible that there are many attorneys who have not practiced in the Supreme Courts of their States for the requisite number of years and yet who, so far as learning, native capacity and character are concerned, are as well or better qualified well and faithfully to represent the interests of their clients and to assist justice in the Supreme Court of the United States as many of those who have grown hoary with age in the practice in the courts of their own States. Attorneys are admitted to this practice "upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact of the admission of such officers in the highest courts of the States to which they respectively belong, *for three years preceding their application*, is regarded as *sufficient evidence* of the possession of the requisite *legal learning*, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair." Ex Parte Garland, 4 Wallace, 378. Again, in some of the States the statutes require study for a certain number of years as a precedent qualification to admission. In Nebraska it has been held that under the statute of that State attentive study of the law in the office of a practicing attorney for the full period of two years or regular graduation from the college of law of the University of Nebraska was absolutely required, and that study in any other law school or otherwise than in such an office would not be considered. In Re Admission to the Bar, 84 N. W. Rep., 611. See also Wilson's Application, 9 Pa. Dist., 102. In a New Jersey case

(Matter of Dunn, 43 N. J. L., 359, 39 Am. Rep., 600), it was held that the applicant, during his period of clerkship, must have been actually engaged in assisting the attorney whom he served in his business and under his control; and in New York the applicant must have studied under the personal direction of the attorney. A. B.'s Application, 4 Johns (N. Y.), 191; Anonymous, 3 Wend., 456; Ex Parte Sayre, 7 Cow. (N. Y.), 368. See also Com. vs. Judges Cumberland County Ct. C. Pl., 1 Serg. & R. (Pa.), 187. Although the statute of South Dakota prescribed an examination, it was held that the examination could not be required where the attorney had previously engaged in the practice under a certificate of the Circuit Court. In Re Applications for Admission to Practice, 14 S. D., 429, 85 N. W., 992. In all of these statutes and rules, *experience* is recognized as having a relation to *knowledge*, and is taken as one of the things reasonably tending to prove the fact of *knowledge*. If the court, or the Legislature, can require experience for a number of years as a condition precedent to admission to the bar, we can see no reason why they could not make experience for a sufficient length of time the sole qualification and requisite.

The extent to which the State may go in saying what classes shall be prohibited from engaging in an occupation, and in saying what qualifications those who are permitted to enter shall have, is well illustrated, with reference to the legal profession, in the cases of Ex Parte Lockwood, 154 U. S., 116, and Bradwell vs. Illinois, 16 Wallace, 130, in which it was held that the State could prevent a woman, although a *citizen* of the State and of the United States and otherwise well qualified, from practicing in the profession of law. We believe no good reason can be advanced why a woman cannot acquire the learning and other accomplishments necessary to fit her for this work as well as a man can do so. 1 Tiedeman on State and Federal Control of Persons and Property, page 244. In fact, no serious question was made over the proposition that the women who were applicants in the cases cited did not have the requisite learning; nevertheless, the power of the

State to say for itself, finally, that women, simply because of their sex, should not have the privilege of earning a livelihood through the pursuit of this occupation.

As with lawyers, prior experience is frequently taken into consideration by the various States in prescribing the qualifications of physicians, dentists, etc. The Dent and Hawker cases, supra, illustrate this. See also Williams vs. People, 9 West. Rep., 461, 121 Illinois, 84, where it is held that no special immunity or franchise is granted by a statute regulating the practice of medicine which permits those who have been practicing ten years to continue without further qualifications, and State vs. Creditor, 44 Kansas, 565. A statute of Minnesota required persons to have a diploma from a dental college in order to be *eligible for examination for license* as a dentist, with discretion to the board of examiners to dispense with the diploma requirement in a case where the applicant had practiced for ten years. This statute was held in State vs. Vandersluis, 6 L. R. A., 119, 42 Minnesota, 129, not to create an unconstitutional discrimination between persons or classes, although they were not pecuniarily able to attend a dental college. Laying out of consideration questions of character, the underlying idea of all these statutes prescribing certain courses of study, diplomas from schools, years of experience, etc., for lawyers, physicians, dentists, etc., is simply to require some evidence of *knowledge* of the things intimately connected with the practice of the occupation which the practitioner should know before he becomes safe. A study of these statutes, and the decisions arising under them, discloses: 1. That *experience* is practically uniformly regarded by Legislatures and courts as having an intimate relation to the acquisition of knowledge, and as being of itself sufficient *evidence* of knowledge; and (2) that wide discretion is conceded to the Legislature in the selection of the qualifications.

The lawyer has to do with the life, liberty and property of his fellow-man; the dentist and doctor with health and life, and it is concededly proper that fit men should be required for these high

places. But none the less should railway companies be required to place efficient men in charge of the operation of their trains, for to the charge of these men constantly are confided property and life itself which is greater than and includes health and liberty.

IV. THIRD PROPOSITION.

THE STATUTE DOES NOT CONSTITUTE A DIRECT REGULATION OF INTERSTATE COMMERCE.

Smith vs. Alabama, 124 U. S., 465, 482.

Nashville, etc. Ry. Co. vs. Alabama, 128 U. S., 96.

The Constitution of Texas does not authorize the incorporation of railway companies for the purpose of the construction or operation of railroads except between points *within* the State. Article 10, Section 1. The statutes follow the Constitution. Revised Statutes of Texas, Article 6108. "The State line is, in law and in fact, one terminus of the line of a railroad intersecting it constructed by a Texas corporation because its powers cease at that line."—Supreme Court of Texas in the case of Railroad Commission of Texas vs. C. R. I. & G. Ry. Co., 102 Texas, 397. The Texas & Gulf Railway Company, in whose employment the plaintiff in error was at the time of the commission of the offense prosecuted in this case, is chartered by the State of Texas, and its line of road is wholly within the State. (Transcript of record, pages 6-7.) In view of these facts, the language of this court, in Smith vs. Alabama, 124 U. S., 465, 481-482, may appropriately be repeated here:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and

agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not per se regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution."

Congress has not legislated upon this subject; this is not contended by plaintiff in error, and in the absence of such legislation, the language quoted would appear to be conclusive of the proposition.

V. FOURTH PROPOSITION.

THE EFFECT, IF ANY, OF THE STATUTE UPON INTERSTATE COMMERCE IS INCIDENTAL ONLY, AND, SINCE THE STATUTE HAS A REAL RELATION TO THE SUITABLE PROTECTION OF THE PEOPLE OF THE STATE, IT IS NOT INVALID EVEN THOUGH IT MAY INCIDENTALLY AFFECT INTERSTATE COMMERCE.

Smith vs. Alabama, 124 U. S., 465.

Ry. Co. vs. Alabama, 128 U. S., 96.

Plumley vs. Massachusetts, 155 U. S., 461.

Hennington vs. Georgia, 163 U. S., 299.

N. Y., N. H. & H. Ry. Co. vs. New York, 165 U. S., 628.
C. M. & St. P. Ry. Co. vs. Solan, 169 U. S., 133.
M., K. & T. Ry. Co. vs. Haber, 169 U. S., 613.
Ptapsco Guana Co. vs. North Carolina, 171 U. S., 345.
Reid vs. Colorado, 187 U. S., 137.
Pennsylvania Ry. Co. vs. Hughes, 191 U. S., 477.
Crossman vs. Lurmann, 192 U. S., 189.
McLean vs. Denver & Rio Grande Ry. Co., 203 U. S., 38, 50.
Asbell vs. Kansas, 209 U. S., 251, 254-256.
C. R. I. & P. Ry. Co. vs. Arkansas, 219 U. S., 453.
Savage vs. Jones, 225 U. S., 525.

VI. FIFTH PROPOSITION.

THE EFFECT OF THE STATUTE BEING WELL CALCULATED TO SECURE COMPETENT TRAIN OPERATIVES, AND THUS TO PREVENT DELAYS AND DISASTERS TO PERSONS AND PROPERTY IN TRANSIT IN INTERSTATE COMMERCE, IT WORKS AS AN AID TO SUCH COMMERCE IN SO FAR AS IT AFFECTS THE SAME AT ALL.

In Southern Ry. Co. vs. United States, 222 U. S., 20, 27, this court said: "Besides, the several trains of the same railroad are not independent in point of movement and safety, but are interdependent, for whatever brings delay or disaster to one, or results in disabling one of its operatives, is calculated to impede the progress and imperil the safety of other trains. And the absence of appropriate safety appliances from any part of any train is a menace not only to that train but to others." The Legislature has declared that the act is calculated to prevent disaster to passengers and employes and property in transit; this result would seem to be obvious. Its effect is none the less to add to the safety of those persons and that property moving in domestic commerce than to the safety of property and persons traveling between the States. This would appear to be an *aid*, rather than a *burden*, to interstate commerce. See, also:

Mobile County vs. Kimball County, 102 U. S., 691.
N. Y., N. H. & H. Ry. Co. vs. New York, 165 U. S., 628.

Wherefore, defendant in error respectfully prays that the judgment of the Court of Criminal Appeals of the State of Texas in this case be in all things affirmed.

Respectfully submitted.

B. F. Looney,
Attorney General.
Luther Nickels,
Assistant Attorney General.
Attorneys for Defendant in Error the State of Texas.

SMITH *v.* STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 268. Argued March 12, 1914.—Decided May 11, 1914.

Life, liberty, property and equal protection of the laws as grouped together in the Constitution are so related that the deprivation of any one may lessen or extinguish the value of the others.

In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work.

Liberty means more than freedom from servitude; and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

A State may prescribe qualifications and require an examination to test the fitness of any person to engage, or remain, in the public calling.

While the State may legislate in regard to the fitness of persons privately employed in a business in which public health and safety are concerned, the tests and prohibitions must be enacted with reference to such business, and not so as to unlawfully interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *Lawton* v. *Steele*, 152 U. S. 133.

Arbitrary tests by which competent persons are excluded from lawful employment must be avoided in state regulations of employment in private business affecting public health and safety. *Smith* v. *Alabama*, 124 U. S. 465.

The statute of Texas of 1909 prohibiting any person from acting as a conductor on a railroad train without having for two years prior thereto worked as a brakeman or conductor of a freight train and prescribing no other qualifications, excludes the whole body of the

public from the right to secure employment as conductors and amounts, as to persons competent to fill the position but who have not the specified qualification, to a denial of the equal protection of the law.

A State cannot, in permitting certain competent persons to accept a specified private employment, lay down a test which absolutely prohibits other competent persons from entering that employment.

Quære, whether such a statute is not also unconstitutional under the Commerce Clause as applied to conductors employed on trains engaged in interstate commerce.

THE facts, which involve the constitutionality of the statute of Texas of 1909 prescribing qualifications for conductors on railroad trains, are stated in the opinion.

Mr. Gardiner Lathrop, with whom *Mr. Robert Dunlap* was on the brief, for plaintiff in error:

The Texas statute deprives defendant, without due process of law, of liberty to engage in a lawful occupation for which he was shown to be well fitted and denies to him the equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U. S. 369; *Barbier* v. *Connolly*, 113 U. S. 31; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 559; *Lochner* v. *New York*, 198 U. S. 53; *Adair* v. *United States*, 208 U. S. 173; *Dent* v. *West Virginia*, 129 U. S. 114, 124, 125; *Reetz* v. *Michigan*, 188 U. S. 508, 509; Cooley's Const. Lim., 7th ed., pp. 889, 890; *Bank of Columbia* v. *Okely*, 4 Wheat., p. 244; *Marbury* v. *Madison*, 1 Cranch, 176; *Wyeth* v. *Thomas*, 200 Massachusetts, 474; *Josma* v. *Western Car Co.*, 249 Illinois, 508; *Bonnett* v. *Vallier*, 136 Wisconsin, 193; *Chenoweth* v. *Examiners*, 135 Pac. Rep. 771; *Ruhstrat* v. *People*, 185 Illinois, 133, 141, 142; *People* v. *Schenck*, 257 Illinois, 384; *In re Opinion of Justices*, 211 Massachusetts, 618; *Morgan* v. *State*, 101 N. E. Rep. 7; *State* v. *Wagener*, 69 Minnesota, 206; *Commonwealth* v. *Snyder*, 182 Pa. St. 630; *State* v. *Kreutzberg*, 114 Wisconsin, 530; *People* v. *Hawkins*, 157 N. Y. 7; *Vicksburg* v. *Mullane*, 63 So. Rep. 412.

As to what is an arbitrary classification, see *G., C. &*

S. F. Ry. Co. v. *Ellis*, 165 U. S. 150; *Connolly* v. *Union Pipe Co.*, 184 U. S. 549; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Smith* v. *Examiners*, 88 Atl. Rep. 963; *Little* v. *Tanner*, 208 Fed. Rep. 605, 609.

An enactment cannot invade the rights of persons and property under the guise of a police regulation when it is not such in fact. *Eden* v. *People*, 161 Illinois, 296; *People* v. *Marx*, 99 N. Y. 377; *Ritchie* v. *People*, 155 Illinois, 98; *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry.* v. *Alabama*, 128 U. S. 96; *Williams* v. *Arkansas*, 217 U. S. 79; *Watson* v. *Maryland*, 218 U. S. 173; *C., B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226; *Lawton* v. *Steele*, 152 U. S. 137; *Minnesota* v. *Barber*, 136 U. S. 319; *Brimmer* v. *Rebman*, 138 U. S. 78; *Henderson* v. *New York*, 92 U. S. 259, 268; *Eubank* v. *Richmond*, 226 U. S. 137; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; *Butchers' Union* v. *Crescent City Co.*, 111 U. S. 761.

The Texas statute is an unreasonable interference with the carrying on of interstate commerce. *Adams Express Co.* v. *New York*, 232 U. S. 14; *Savage* v. *Jones*, 225 U. S. 525; *Yazoo & Miss. R. R.* v. *Greenwood Grocery Co.*, 227 U. S. 1, 3; *Houston & Tex. Cent. R. R.* v. *Mayes*, 201 U. S. 321; *Central Ry. Co.* v. *Murphy*, 196 U. S. 194, 203, 204.

Mr. B. F. Looney, Attorney General of the State of Texas, and *Mr. Luther Nickels*, for defendant in error, submitted:

The general purpose of the act was within the police power of the State. *Lochner* v. *New York*, 198 U. S. 53; *Mugler* v. *Kansas*, 123 U. S. 623; *In re Kemmler*, 136 U. S. 436; *Crowley* v. *Christensen*, 137 U. S. 86; *In re Converse*, 137 U. S. 624.

A State may prohibit unqualified men from occupying responsible positions in train operation. *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96.

The State has the power to prevent individuals from

making certain kinds of contracts in regard to which the Federal Constitution offers no protection. *Smith* v. *Alabama*, 124 U. S. 465; *N. C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Olsen* v. *Smith*, 195 U. S. 332; *Otis* v. *Parker*, 187 U. S. 606; *Holden* v. *Hardy*, 169 U. S. 366; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *St. L., I. M. &c. Ry. Co.* v. *Paul*, 173 U. S. 404; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

A man has no right to engage in or pursue any calling, the proper prosecution of which requires a certain amount of technical knowledge or professional skill, the lack of which may result in material injury to the public or individuals, which can be controlled in all cases, or, in proper cases, be taken away by state legislation. *Lochner* v. *New York*, 198 U. S. 53; *Smith* v. *Alabama*, 124 U. S. 465; *N. C. St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96; *Olsen* v. *Smith*, 68 S. W. Rep. 320; *S. C.*, 195 U. S. 332; 1 Tiedeman, p. 242.

The legislature, having the power to prevent unqualified men from pursuing the occupation of conductors, had also the power to classify and the power to prescribe the one qualification of prior service. *McCulloch* v. *Maryland*, 4 Wheat. 316, 421; *License Cases*, 5 How. 504; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri &c. Ry. Co.* v. *May*, 194 U. S. 267; *Gundling* v. *Chicago*, 177 U. S. 183, 188.

If the statute admits of two constructions, one of which is a reasonable exercise of the police power and the other is unreasonable, in that it promotes or does not promote the public interests, the former construction should be adopted, and the statute sustained as constitutional. *People* v. *Warden*, 144 N. Y. 529; 1 Tiedeman, p. 235.

The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. *Dent* v. *West Virginia*, 129 U. S. 122; *Watson* v. *Maryland*, 218 U. S. 173; *State* v. *Loomis*, 115 Missouri, 307; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 155; *Jones* v. *Brim*, 165 U. S. 180, 183; *Hawker* v. *New*

York, 170 U. S. 197, 198; *County Seat* v. *Linn County*, 15 Kansas, 500, 528.

As to the extent to which the State may go in saying what classes shall be prohibited from engaging in an occupation, and in saying what qualifications those who are permitted to enter shall have, see *Ex parte Lockwood*, 154 U. S. 116; *Bradwell* v. *Illinois*, 16 Wall. 130; *Dent* v. *West Virginia*, 129 U. S. 122; *Hawker* v. *New York*, 170 U. S. 189; *Williams* v. *People*, 9 West. Rep. 461; 121 Illinois, 84; *State* v. *Creditor*, 44 Kansas, 565; *State* v. *Vandersluis*, 42 Minnesota, 129.

The statute does not constitute a direct regulation of interstate commerce. *Smith* v. *Alabama*, 124 U. S. 465, 482; *Nashville &c. Ry. Co.* v. *Alabama*, 128 U. S. 96.

The effect, if any, of the statute upon interstate commerce is incidental only, and, since the statute has a real relation to the suitable protection of the people of the State, it is not invalid even though it may incidentally affect interstate commerce. *Smith* v. *Alabama*, 124 U. S. 465; *Ry. Co.* v. *Alabama*, 128 U. S. 96; *Plumley* v. *Massachusetts*, 155 U. S. 461; *Hennington* v. *Georgia*, 163 U. S. 299; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628; *C., M. & St. P. Ry. Co.* v. *Solan*, 169 U. S. 133; *M., K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613; *Patapsco Guana Co.* v. *North Carolina*, 171 U. S. 345; *Reid* v. *Colorado*, 187 U. S. 137; *Pennsylvania Ry. Co.* v. *Hughes*, 191 U. S. 477; *Crossman* v. *Lurmann*, 192 U. S. 189; *McLean* v. *Denver & R. G. Ry. Co.*, 203 U. S. 38, 50; *Asbell* v. *Kansas*, 209 U. S. 251, 254–256; *C., R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Savage* v. *Jones*, 225 U. S. 525.

The effect of the statute being well calculated to secure competent train operatives, and thus to prevent delays and disasters to persons and property in transit in interstate commerce, it works as an aid to such commerce in so far as it affects the same at all. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, 27; *Mobile County* v. *Kimball*

County, 102 U. S. 691; *N. Y., N. H. & H. Ry. Co.* v. *New York*, 165 U. S. 628.

MR. JUSTICE LAMAR delivered the opinion of the court.

W. W. Smith, the plaintiff in error, a man 47 years of age, had spent 21 years in the railroad business. He had never been a brakeman or a conductor, but for six years he served as fireman, for three years ran as extra engineer on a freight train, for eight years was engineer on a mixed train, hauling freight and passengers, and for four years had been engineer on a passenger train of the Texas & Gulf Railway. On July 22, 1910, he acted as conductor of a freight train running between two Texas towns on that road. There is no claim in the brief for the State that he was not competent to perform the duties of that position. On the contrary it affirmatively and without contradiction appeared that the plaintiff in error, like other locomotive engineers, was familiar with the duties of that position and was competent to discharge them with skill and efficiency. He was, however, found guilty of the offense of violating the Texas statute which makes it unlawful for any person to act [1] as conductor of a freight train without having

[1] SEC. 2. If any person shall act or engage to act as a conductor on a railroad train in this State without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense.

SEC. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon or cause any person to do any act in violation of the provisions of the two preceding sections of this act, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars, and each day he so engages shall constitute a separate offense. (Act of March 11, 1909, c. 46, General Laws of Texas 1909, p. 92.)

previously served for two years as conductor or brakeman on such trains. On that verdict he was sentenced to pay a fine and the judgment having been affirmed the case is here on a record in which he contends that the statute under which he was convicted violated the provisions of the Fourteenth Amendment.

1. Life, liberty, property and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

If the service is public the State may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. *Ex parte Lockwood*, 154 U. S. 116; *Hawker* v. *New York*, 170 U. S. 189; *Watson* v. *Maryland*, 218 U. S. 173. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the State may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object and so as not unduly to "interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton* v. *Steel*, 152 U. S. 133, 137.

A discussion of legislation of this nature is found in *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 96, 98, where this court sustained the validity of a statute which required

all locomotive engineers to submit to an examination for color-blindness and then provided that those unable to distinguish signals should not act as engineers on railroad trains. That statute did not prevent any competent person from being employed, but operated merely to exclude those who, on examination were found to be physically unfit for the discharge of a duty where defective eyesight was almost certain to cause loss of life or limb. Another case cited by the plaintiff in error is that of *Dent* v. *West Virginia*, 129 U. S. 114. The act there under review provided that no one except licensed physicians should be allowed to practice medicine, and declared that licenses should be issued by the State Board of Health only to those (1) who were graduates of a reputable medical college; (2) to those who had practiced medicine continuously for ten years; or (3) to those who after examination were found qualified to practice. Ten years' experience was accepted as proof of fitness, but such experience was not made the sole test, since the privilege of practicing was attainable by all others who, by producing a diploma or by standing an examination, could show that they were qualified for the performance of the duties of the profession. In answer to the contention that the act was void because it deprived the citizen of the liberty to contract and the right to labor the court said no objection could be raised to the statutory requirements "because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation" (p. 122).

The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in *Smith* v. *Alabama*, 124 U. S. 465, 480. There the act provided that all engineers should secure a license, and in sustaining the

validity of the statute the court pointed out that the law "requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed nor prescribe any arbitrary conditions to the grant." This and the other cases establish, beyond controversy, that in the exercise of the police power the State may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employé. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other States, to act in the same capacity in the State of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification, for appointment as conductor, than that for two years the

applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains and having the same kind of experience as a brakeman, are given no chance to show their competency but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals and methods of moving and distributing cars, and if the training of one qualifies him to serve as conductor the like training of the other should not exclude him from the right to earn his living in the same occupation.

It is argued in the brief for the State that in practice, brakemen on freight trains are generally promoted to the position of freight conductors and then to the position of conductors on passenger trains. And yet, under this act even passenger conductors, of the greatest experience and highest capacity, would be punished if they acted as freight conductors without having previously been brakemen.

The statute not only prevents experienced and competent men in the passenger service from acting as freight conductors, but it excludes the engineer on a freight train,—even though, under the rules of all railroads, the freight engineer now acts as conductor in the event the regular conductor is disabled en route. This general cus-

tom is a practical recognition of their qualification and is founded on the fact that the engineer, by virtue of his position, is familiar with the rules and signals relating to the train's movement and peculiarly qualified for the performance of the duties of conductor. If we cannot take judicial knowledge of these facts the record contains affirmative proof on the subject. For, according to the testimony [1] of the State's witness "acting as engineer on

[1] I understand the railroad business and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman. Under the rules of all railroads, and of The Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor on a train is made in duplicate and one copy of it is given to the conductor and the other to the engineer. It is a rule with railway companies that if anything should happen to disable the conductor or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the way bills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The way bills are plainly written and the destinations plainly given, and booking the way bills and delivering them with the cars is clerical, and can be done by any one that can read and write and who has ordinary sense. Every act that is to be done by the conductor toward the safe handling of the train also has to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer.

a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman." And yet, though at least equally competent, the engineer is denied the right to serve as conductor and the exclusive right of appointment and promotion to that position is conferred upon brakemen.

3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer it—and the answer in no way denies the right of the State to require examinations to test the fitness and capacity of brakemen, firemen, engineers and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act—because he is presumptively competent—and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety but denies to many the liberty of contract granted to brakemen and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakemen and conductors on passenger trains could be selected, and so, progressively, the whole matter, as to who could enter the railroad service and who could go from one position to another, would be regulated by statute. In the nature of the case, promotion is a matter of private business management, and

should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions.

4. There was evidence that Smith safely and properly operated the train which had in it cars containing freight destined for points in Texas, Missouri, Oklahoma and Kansas. But in view of what has been said it is not necessary to consider whether the plaintiff, as engineer, was in a position to raise the point that under the decision in *Adams Express Co.* v. *City of New York*, 232 U. S. 14, the statute interfered with interstate commerce.

The judgment is reversed and the case remanded to the Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES dissents.